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2461
No. 11527

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

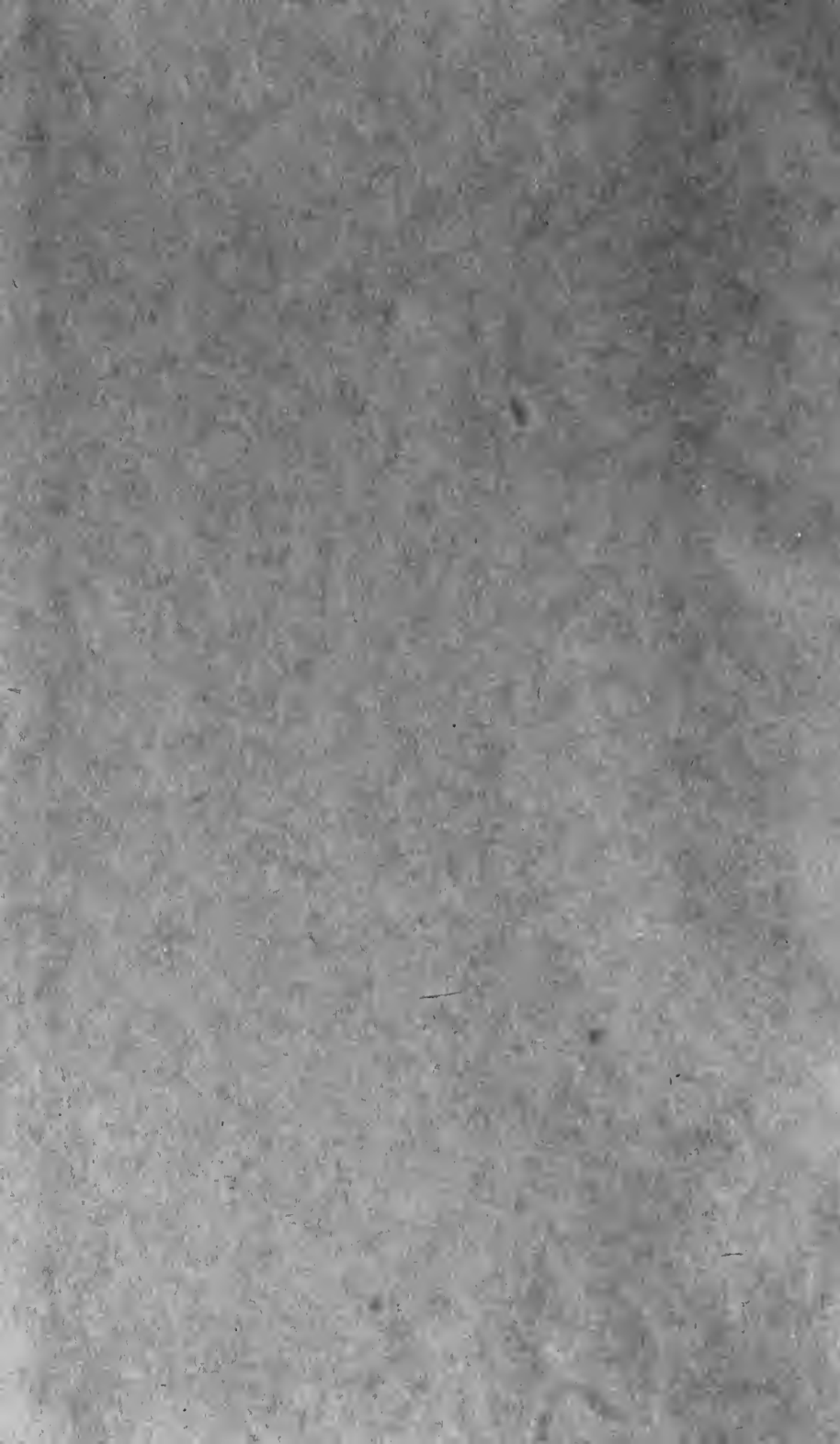
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Statement of the Issues Involved.

Point I. The total amount of lien and encumbrance of the appellant on the property on December 9, 1942, was \$45,000.00, plus 7% interest thereon compounded quarterly, including interest on the unpaid interest thereon from July 30, 1927, to December 9, 1942, less all sums paid on account thereof.

Point II. The appellant being a secured creditor and being the sole creditor and the estate being ample to pay the entire claim, as well as interest from and after the filing of the petition, equity requires the payment of interest from and after filing said petition to the appellant.

Point III. The judgment in the case of *Hall v. Citizens National Bank*, 53 Cal. App. (2) 625, is *res judicata* that the obligation of appellees was valid and existing under the declaration of trust and the deed of trust on November 4, 1940, and that the appellant had not waived and was not estopped from enforcing the same.

Point IV. There is no evidence of a waiver or estoppel with respect to payment of principal or interest sufficient to sustain the judgment of the lower court.

Point V. Appellees do not have a sufficient interest in the real property in question to maintain the instant proceedings under section 75.

Point VI. The determination of the validity and amount of appellant's secured claim, including interest up to December 9, 1942, is a matter of right and not a matter of judicial discretion.

A. Even if the allowance of interest up to December 9, 1942, herein be a matter of judicial discretion, there was an abuse of such discretion by the failure to allow interest in accordance with the provisions of the obligation from its inception to December 9, 1942.

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No. 11527
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

On December 9, 1942, appellees filed an original Petition for Farmer-debtor Relief under Section 75 of the Bankruptcy Act. [Tr. pp. 2-3.]

On April 2, 1943, appellees filed a Composition and Extension Proposal. [Tr. pp. 73-75.]

On April 15, 1943, appellant filed a rejection of the said Composition and Extension Proposal.

On June 4, 1943, appellees filed a Petition for Adjudication under Section 75-s of the Bankruptcy Act, and on said date an Order of Adjudication and of General Reference was made pursuant to said Section. [Tr. pp. 5-6, 7.]

On July 19, 1943, appellees filed a Petition for Determination of Existing Lien and Encumbrance. [Tr. pp. 8-12.]

On July 20, 1943, appellant filed a Petition for an Order to Apply Moneys to Payment of Debt. [Tr. pp. 16-19.] The aforesaid two petitions were heard and determined together, and an order was filed respecting the same together with Findings of Fact and Conclusions of Law on August 1, 1944. [Tr. pp. 20-42.]

Appellant appealed from said order to the District Court of the United States, Southern District of California, Central Division. [Tr. pp. 43-52.]

On November 14, 1946, said Court affirmed the prior order of August 1, 1944, and filed a Memorandum of Decision thereon. [Tr. pp. 58-65.]

Appellant has taken this appeal from said Order of November 14, 1946. [Tr. p. 66.]

Statement of Facts.

In 1927 appellees owned certain ranch property in Leona Valley, Los Angeles County, California, consisting of approximately 3,000 acres. They had encumbered this property with a \$35,000 Deed of Trust and Declaration of Trust in favor of Liberty Bank of America. The purpose of this loan was to finance the sub-division of this property into residential lots, and appellees had begun to sub-divide and sell the land in accordance with said Declaration of Trust. On January 13, 1927, appellees organized a California corporation known as FARM HOME BUILDERS, which corporation was and is wholly owned by appellees. On April 9, 1927, title to the said property was transferred to Farm Home Builders.

On July 30, 1927, Farm Home Builders borrowed \$45,000.00 from Pan-American Bank of California, evidenced

by a promissory note [Petitioners' Exhibit No. 6, Tr. pp. 139-140, 239-244] and secured by a deed of trust [Petitioners' Exhibit No. 1-B, Tr. pp. 140-150] and by a declaration of trust. [Tr. pp. 23, 24.]

This loan was used to pay off the indebtedness to Liberty Bank of America and to provide additional capital for the sub-division of the property into residential lots.

On July 19, 1929, the California Superintendent of Banks took over the Pan-American Bank. [Tr. p. 58.]

The original declaration of trust with Pan-American Bank was superseded by a declaration of trust No. 5873, dated December 2, 1929. [Citizens Bank Exhibit No. 4, Tr. pp. 275-299.]

On January 7, 1930, and on August 20, 1931, the Superintendent of Banks executed grant deeds to all of said property to the Citizens National Bank & Trust Company of Los Angeles which was trustee under said declaration of trust No. 5873.

The said note of July 30, 1927, provides in part as follows:

STRAIGHT NOTE.

DO NOT DESTROY THIS NOTE: When paid, this note with Deed of Trust securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made. \$45,000.00 Los Angeles, California, July 30th, 1927

On or before Five (5) years after date, for value received, I, we, or either of us, promise to pay to PAN AMERICAN BANK OF CALIFORNIA, a corporation, or order, at PAN AMERICAN BANK OF CALIFORNIA, Los Angeles, Calif., the sum of FORTY-FIVE THOU-

SAND AND NO/100 (\$45,000.00)—DOLLARS, with interest from date until paid, at the rate of Seven (7%) per cent per annum, payable quarterly, in advance.

Should interest not be so paid it shall become part of the principal and thereafter bear like interest. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. This note is secured by a DEED OF TRUST to TITLE INSURANCE AND TRUST COMPANY, a corporation, of Los Angeles, California.

FARM HOME BUILDERS, INCORPORATED

By F. D. Hall, President

By Erwin S. Hall, Secretary.

The said declaration of trust No. 5873 conveys said real property to the trustee to hold until the sale or disposition of all of the property subject to the trust and the distribution of the proceeds thereof in accordance therewith. The only interest of Farm Home Builders thereunder is to receive any sums remaining in the hands of the trustee after first deducting the amounts necessary for the payment of all items shown in the trust.

The trust provides for release prices for each lot. On October 28, 1935, the trust was amended to reduce the release prices. [Petitioners' Exhibit No. 1A, Tr. pp. 176-181.] On February 9, 1939, a further amendment was made, further reducing the release prices. [Petitioners' Exhibit No. 1-A, Tr. pp. 182-201.] Each of these amendments acknowledged and reaffirmed the existence of the trust and left it unchanged except for the new prices.

Farm Home Builders' corporate powers were suspended on June 26, 1930, and were not revived until November 22, 1940. During this period of suspension, the corporation purported to convey its rights to the said property to the appellees on December 12, 1932. [Tr. p. 25.] The trust provides that no transfer of any interest thereunder shall be valid or binding on the trustee until the instrument accompanying the same shall be accepted by the trustee. The trustee has never accepted the purported transfer of interest in the property by Farm Home Builders. The trustee has always dealt with Farm Home Builders and never with appellees individually, as beneficiary under said trust.

Appellant acquired the interest of Pan-American Bank in the aforesaid note of July 30, 1927, deed of trust and declaration of trust as amended on November 2, 1939, from the Superintendent of Banks for a valuable consideration. [Petitioners' Exhibit No. 1-G, Tr. pp. 202-205.]

During the administration of the estate herein, in July, 1943, pursuant to court order, certain sales of portions of the real property were authorized and consummated aggregating approximately \$49,878.38 net, which sum is being held by the trustee subject to court order. [Tr. p. 30.]

On June 4, 1940, appellees being in default on payment of principal, interest and taxes, appellant directed the trustee to declare all obligations under said trust due and owing and to proceed to a trustee's sale. Notice of sale was given on July 3, 1940, and the sale was noticed

for November 13, 1940. [Petitioners' Exhibit No. 1-I, Tr. pp. 219-238.]

On November 4, 1940, appellees filed an action in the Superior Court of the State of California, County of Los Angeles, Case No. 457525, seeking both a temporary and permanent injunction against the trustee and the appellant to enjoin a foreclosure sale of the real property under the aforesaid deed of trust and to enjoin a sale under either the deed of trust or under the aforesaid declaration of trust. [Tr. pp. 112-138.] An appeal was taken from the judgment of the Superior Court in said case and on July 28, 1942, the District Court of Appeal (First District, Division 2) held that the appellees were entitled to no injunctive relief and gave judgment in favor of the appellant and the trustee (*Hall v. Citizens National Bank*, 53 Cal. App. (2d) 625). The appellees' petition for a hearing by the Supreme Court of California was denied on September 24, 1942.

In the aforesaid State Court action begun on November 4, 1940, the appellees admitted on verified complaint that the said note of July 30, 1927, and the said declaration of trust No. 5873 and deed of trust were in full force and effect. Their complaint alleged as follows:

"From and after July 30, 1932, and continuously up to on or about November 1, 1939, defendants, Title Company and Citizens Bank, and the Pan-American Bank in Liquidation, and thereafter to on or about June 1, 1940, said defendants, Title Company and Citizens Bank, continued to receive payments derived from the proceeds of the sale of real property and to apply same in the reduction of the principal sum of said note, and the payment of inter-

est thereon in the same manner and according to the same practice which had been adopted and used by the Citizens Bank and Title Company, and each of them, prior to July 30, 1932, and said Title Company and Citizens Bank and the plaintiffs continued to operate under their respective Trusts, (Deed of Trust dated July 30, 1927, and Trust No. 5873), after July 30, 1932 in the same general manner as prior thereto.” [Tr. p. 121.]

In said complaint, appellees further admitted with respect to the aforesaid trust amendment of October 28, 1935:

“ . . . except for the change in the schedule of minimum selling and release prices, each and all of said parties continued to operate under said declaration of trust No. 5873 in the same manner as they had operated prior to July 30, 1932.” [Tr. p. 122.]

Similarly, with respect to the aforesaid trust amendment of February 9, 1939, appellees alleged and admitted that

“ . . . it was then the continuing mutual plan, purpose, intention, program and policy of the parties to said amendment and the Title Company that the appellees Frank D. Hall and Marguerite S. Hall should continue to sell and dispose of the real property described in said deed of trust, and that from the proceeds derived from such sales, payments should be made on said note in the reduction of the principal sum and in the payment of interest; and that except only for the change in the schedule of release prices, the parties thereto, and the Title Company, were to and should continue to act and perform their respective duties and functions under said declaration of trust in the same manner and for the same purpose as prior to July 30, 1932. . . .” [Tr. p. 123.]

Among the matters decided in the State Court action was the determination that the appellees were in error in their contention that the trustee and the appellant had waived payment of principal or interest on the obligation herein so as to bar appellant from foreclosing on the property or causing the same to be sold by the trustee. The District Court of Appeal in its aforesaid opinion necessarily found the obligation to be in full force and effect, since it held that the Superior Court had “. . . further erred in holding that no sale under the declaration of trust could be made for failure to pay principal or interest.”

The detailed facts concerning the obligation of the appellees may be determined from a statement, dated October 8, 1942, prepared by the trustee and sent to the appellees covering the period from August 19, 1927, to October 30, 1942. [Tr. pp. 251-266.]

Periodic statements of account were rendered by the trustee to the appellee during the years 1933 to 1940, inclusive, to which the appellees have at no time made any objection. [Tr. pp. 27-29.]

The aforesaid periodic statements of the trustee show the following payments on account of principal [Tr. pp. 251-266] :

Jan. 1, 1933	to May 9, 1933	\$ 447.33
Sept. 6, 1933	to Dec. 31, 1933	432.04
Jan. 1, 1934	to May 31, 1934	451.30
June 1, 1934	to Dec. 31, 1934	667.45
Jan. 1, 1935	to Dec. 31, 1935	306.22
Jan. 1, 1936	to Dec. 31, 1936	634.54
Jan. 1, 1937	to Dec. 31, 1937	1,852.55
Jan. 1, 1938	to Dec. 31, 1938	1,953.95
Jan. 1, 1940	to Dec. 31, 1940	1,264.08

The aforesaid statement for the period from January 1, 1940, to Dec. 31, 1940, also shows a payment to appellant of \$363.85 on account of interest. [Tr. pp. 300-307.]

All interest due on said note was paid to and including January 30, 1932. Thereafter no payments on account of interest were made until the aforesaid payment as shown in 1940 account in the sum of \$363.85. [Tr. pp. 27-29.] The aforesaid statement of October 8, 1942, shows a total unpaid balance due and owing as of October 30, 1942, including principal and interest, in the sum of \$55,479.75.

Each of the aforesaid amendments to the trust, dated Oct. 28, 1935, and Feb. 9, 1939, recites that other than the new schedule of release prices for lots:

“ . . . that in all other respects the said declaration of trust shall be and remain in full force and effect and be binding upon the respective parties hereto.” [Tr. pp. 177, 184.]

The original trust No. 5873 expressly provides that its scope is:

“ . . . to secure the payment of the indebtedness of the trustor to Pan-American Bank of California in the sum of \$45,000.00 and interest thereon, together with any renewal and/or renewals and/or extensions thereof.” [Tr. p. 277.]

The said declaration of trust further provides that:

“If one or more of the following events herein, called events of default, shall happen, that is to say;

“1. If default shall be made in the payment of interest due the Pan-American Bank of California, as and when the same shall become due and payable;

“2. If default shall be made in the payment of principal of the obligation due the Pan-American Bank of California, as and when the same shall become due and payable. . . .

“Then, and in each such case, the Trustee may, and upon the written request of the first payee, (Pan-American Bank) shall declare all obligations in favor of the Pan-American Bank of California, and/or the Citizens National Trust and Savings Bank of Los Angeles, together with interest thereon, due and payable and proceed to sell to the highest and best bidder such portion of, or all of the trust property, as in its discretion it may deem necessary or proper, or in one or more or all of the manners and methods hereinafter set forth; . . .” [Tr. pp. 288-289.]

The trust further provides as follows:

“The acceptance of any sum or sums secured hereby, principal or interest, after the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a waiver of a right to insist upon the payment when due of all other sums secured hereby and the performance of any or all obligations herein mentioned, and to declare default and to proceed with the sale under this declaration of trust.” [Tr. pp. 289-290.]

Appellant is the sole creditor of appellees.

POINT I.

The Total Amount of Lien and Encumbrance of the Appellant on the Property on December 9, 1942, Was \$45,000.00, Plus 7% Interest Thereon Compounded Quarterly, Including Interest on the Unpaid Interest Thereon From July 30, 1927, to December 9, 1942, Less All Sums Paid on Account Thereof.

The first matter to be determined is:

Did the appellant have a valid and subsisting lien and encumbrance on certain real property of the debtors on December 9, 1942?

The lien and encumbrance claimed by the appellant is founded upon three separate but integrated obligations:

1. The declaration of trust, as amended;
2. The deed of trust; and
3. The promissory note.

In determining what claims of creditors are valid and subsisting obligations against the bankrupt at the time the proceeding under Section 75 of the Bankruptcy Act is begun, in the absence of overruling federal law, the law of the State of California controls.

Vanston Bondholders Protective Committee v. Green, 329 U. S. 156; *Bryant v. Swofford Bros.*, 214 U. S. 279, 290, 291; *Security Mortgage Co. v. Powers*, 278 U. S. 149, 153, 154.

Since there is no pertinent federal law involved in a determination of the validity of the claim of the appellant, it is submitted that the law of the State of California con-

trols the determination of the validity of said claim as of December 9, 1942.

I-A.

The declaration of trust provides that:

“The Farm Home Builders, Incorporated are indebted to the Pan-American Bank of California as evidenced by one certain promissory note, copy of which is attached hereto, marked Exhibit C, and made a part of this declaration of trust.” [The note referred to is the aforesaid note of July 30, 1927, in the sum of \$45,000.00—Tr. pp. 139-140; p. 276.]

The trust further provides that the trustee is to apply funds:

“To pay to the Pan-American Bank of California, as first payee, all subsequent collections received by the Trustee on account of the principal of the sale price of all lots sold until there shall have been paid to first payee the amount of the release price of the respective lot or parcel, as shown in the schedule of release prices set forth in Exhibit ‘F’, attached hereto and made a part of this declaration of trust, or until all sums due first payee, together with the interest thereon shall have been paid in full.” [Tr. p. 281.]

The agreement of February 9, 1939 [Tr. pp. 182-185], reaffirming said declaration of trust recites, as stated above, that other than the new schedule of release prices for lots “. . . that in all other respects the said declaration of trust shall be and remain in full force and effect and be binding on the respective parties thereto.” Thus the agreement of February 9, 1939, operates to acknowledge, renew and reaffirm the said declaration of trust No.

5873. And it surely constitutes an acknowledgment of the obligation created by said trust within the meaning of Section 360 of the California Code of Civil Procedure.

The parties having reaffirmed the declaration of trust in writing as recently as February 9, 1939, less than four years prior to the institution of the within proceedings, and payments having been made pursuant to said declaration of trust as recently as 1940, it is clear that under California law the declaration of trust was a valid and subsisting lien and encumbrance on the said property on December 9, 1942, the date of filing the within proceedings.

Have the appellees any defense against the assertion of a lien and encumbrance by reason of said trust?

The trust provides, as stated above, that:

“The acceptance of any sum or sums secured hereby, principal or interest. after the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a waiver of a right to insist upon the payment when due of all other sums secured hereby and the performance of any or all obligations herein mentioned, and to declare default and to proceed with the sale under this declaration of trust.” [Tr. pp. 289-290.]

There is no evidence whatsoever of any written alteration, amendment, waiver or release of the obligation of the appellees under the trust subsequent to February 9, 1939. On the contrary, the amendment to the trust of February 9, 1939, as well as the payment of \$1,627.80 on account of principal during the period from January 1,

1939, to December 31, 1939, and the payment of \$1,264.08 on account of principal during the period from January 1, 1940, to December 31, 1940 [Tr. p. 305], indicate the intention of the parties to treat the obligations under the trust as valid and subsisting. Furthermore, the payment of \$363.85 on account of interest during the period from January 1, 1940, to December 31, 1940, indicates the intention of the parties, consistent with the amendment of February 9, 1939, to recognize the obligation of the appellees to pay both principal and interest in accordance with the original obligation under the note and trust. [Tr. p. 305.]

The appellees have admitted, and both the Conciliation Commissioner and the District Court have found that appellees acquiesced in the trustee's annual statements concerning the payments made in 1939 and 1940. [Tr. p. 28.]

Any claim of a waiver of the appellant or the trustee of the right to receive interest during the period prior to February 9, 1939, is thus rendered untenable by the amendment of February 9, 1939, by the trustee's periodic statements for 1939 and 1940, and by the payments made pursuant to the trust as amended. We submit, therefore, that under the declaration of trust the appellant had a valid and subsisting lien and encumbrance on the real property in question on December 9, 1942, in the sum of \$45,000.00, plus 7% interest thereon compounded quarterly from July 30, 1927, including interest on the unpaid interest thereon, to December 9, 1942, less all payments made. We further submit that there is no evidence of any waiver of the provisions of the original trust either before or after February 9, 1939.

Is there any rule of public policy which prevents the enforcement of such an obligation as is here involved?

The weight of authority in the United States is that where a contract provides for a certain rate of interest until the principal sum is paid, “. . . the contract governs until the payment of the principal or until the contract is merged in judgment.”

33 Corpus Juris 225; *Board of Public Instruction v. Ashburn*, 101 F. (2d) 933; *Shepherd v. Pepper*, 133 U. S. 626; *Crumwell v. City of Sacramento*, 96 U. S. 51, 61; *Agency, Etc. Company v. American Can Company* (C. C. A. 2), 258 Fed. 263; *O'Neill v. Bookman*, 43 So. Car. Law (9 Rich. L. (80)); *Wright v. Eaves*, 31 So. Car. Equity, 10 Rich. Eq. (582); *O'Brien v. Young*, 95 N. Y. 428; *Sears v. Greater New York Div. Co.*, 51 F. (2d) 46 (C. C. A. N. Y.), Cert. Den. 284 U. S. 668; *Daniels on Negotiable Instruments*, 6th Ed., Vol. 21, Sec. 1458.

The payment of the contract rate of interest on an obligation such as that here involved is protected by the guaranty of Article I, Sec. 10(1) of the United States Constitution concerning the prohibition against impairment of the obligations of contract.

Moreley v. Lake Shore, Etc. Ry. Co., 146 U. S. 163, 168.

Even in the absence of an express provision in the contract as to the rate after maturity, the weight of authority is likewise that the stipulated rate before maturity will continue to apply after maturity.

33 Corpus Juris 226-227.

This was the rule in California before the Codes. (*Kohler v. Smith*, 2 Cal. 597.) And the California Supreme Court has held that the rule is “. . . general and well established” that interest bearing bonds continue to bear interest at the same rate after their maturity.

Trompeter & Co. v. Monaco, 51 Cal. App. (2d) 668; *Kandall v. Porter*, 120 Cal. 106, 109; *Nash v. El Dorado Co.*, 24 Fed. 252 (Cir. Ct. Cal.).

Section 3289 of the Civil Code of California now makes the rule specific. It provides that:

“ . . . any legal rate of interest stipulated by a contract remains chargeable after a breach thereof as before until the contract is superseded by a verdict or other new obligations.”

Thus the contract must be enforced in the instant case as the parties have agreed. And interest due and unpaid after maturity is to be added to principal and to bear like interest at the rate of seven per cent (7%) per annum, as provided, until paid.

This is in accordance with the settled law under Section 3289, Civil Code, that interest is due and payable after maturity at the contractual rate.

Trompeter & Co. v. Monaco, *supra*; *Benjamin Moore & Co. v. O'Grady*, 9 Cal. App. (2d) 696, 700; *Reidy v. Miller*, 85 Cal. App. 765, 768; *Thompson v. Garner*, 104 Cal. 168; *Finger v. McGaughey*, 114 Cal. 64, 66; *Casey v. Gibbons*, 135 Cal. 368; *Cherokee Nation v. U. S.*, 270 U. S. 476, 490.

There are several additional California cases which reach the same conclusions without express reference to Section 3289 of the Civil Code.

In *Bell v. San Francisco Savings Union*, 153 Cal. 64, the note bore interest at the rate of $\frac{2}{3}$ of 1% per month "until payment of the principal." In case of default of principal or interest, such amounts were to bear interest at the rate of one per cent (1%) per month from maturity until paid. It was held that interest on interest at a rate greater than that borne by the principal was void under Section 1919, Civil Code. But it was held to be proper, after maturity of the principal, to allow interest both on principal and on unpaid accrued interest at the same contract rate which had applied before maturity.

The most recent California case confirming the settled rule that interest will be allowed after maturity until payment or judgment is *Ramillard Brick Company v. R. Dandini Company*, 51 Cal. App. (2d) 744, in which interest at the rate of seven per cent (7%) per annum was allowed even where no interest had been specified.

See also *Nesbit v. MacDonald*, 203 Cal. 219; *Foster v. Beau De Zart*, 13 Cal. App. 128; *O'Neil v. Magner*, 81 Cal. 631; *Chafoin v. Rich*, 92 Cal. 471, 474; *Bank of U. S. v. Foreman*, 102 Cal. App. 756; *U. S. Natl. Bank of Portland v. Waddingham*, 7 Cal. App. 172; *Thrasher v. Moran*, 146 Cal. 683; *Lane v. Glukhauf*, 28 Cal. 288, 294, 295; *Guy v. Franklin*, 5 Cal. 416; *Emeric v. Tams*, 6 Cal. 155; *Mount v. Chapman*, 9 Cal. 294, 297.

The rule is set forth in 19 Cal. Jur. 1058, as follows:

“It is, of course, fundamental that where an instrument provides for a permissible rate of interest, interest shall be allowed accordingly.

Thompson v. Gardner (104 Cal. 168); *Hathaway v. McGillycudahy*, 56 Cal. App. 689; *Riegel v. Wolenshlager*, 49 Cal. App. 300; *Davidson v. Rafael*, 37 Cal. App. 258; *Bither v. Christensen*, 1 Cal. App. 90.

“After a note becomes due, it bears interest at the rate agreed, although nothing is said about interest after maturity. Citing *Kohler v. Smith*, 2 Cal. 597; *Puppo v. Larosa*, 68 Cal. 393.

“The proper method of allowing interest in such a case, in a case where the instrument provides for interest after maturity, is to compute interest at the rate fixed from its date or from its maturity to the date of the decision or entry of judgment, and to add such interest to the principal, which aggregate amount must thereafter bear interest at the legal rate.

“Citing *Glenn v. Rice*, 174 Cal. 269; *LeBreton v. Stanley, Etc. Co.*, 15 Cal. App. 429; *U. S. National Bank v. Waddingham*, *supra*. See *Alpers v. Schammel*, 75 Cal. 590.”

So, also, in *California S. F. Corporation v. Bessolo & Gualano*, 118 Cal. App. 327, 332, the Court held that in an action on a promissory note the payee “was entitled to interest in accordance with the provisions of the promissory note from its date until the date of the rendition of judgment. . . .”

Johansen v. Klipstein, 104 Cal. App. 128, 132, was a suit on a promissory note, where, as in the instant case, the debtor claimed a waiver of interest after maturity and where, as here, a payment had been made on account of principal after maturity. The Court said:

“The note on its face was payable on or before July 1st, 1922, with interest at the rate of seven per cent (7%) from maturity until paid. The note itself was a contract. The intention of the parties is to be gathered from the face of the instrument. There is an express agreement to pay on or before a certain date, and a provision that interest shall be payable from maturity. This was equivalent to saying that interest should be payable from July 1, 1922. That this was the intention of the parties and that they contemplated that interest should be paid during any extension is indicated by the provision on the face of the note, that it shall bear interest from maturity, until it is paid. The endorsements later made merely postponed the date on which payment might be enforced, but there is nothing to indicate any intention to relieve the maker from paying the interest which is provided on the face of the note to be paid from the date of maturity until the time of payment.”

Since the declaration of trust was acknowledged and reaffirmed by the agreement of February 9, 1939, less than four years prior to the commencement of the instant proceedings, it is not barred by the statute of limitations. That being true, interest must be allowed on the full obligation in accordance with the contract of the parties from its inception to December 9, 1942.

I-B.

The lien and encumbrance claimed by the appellant is also based upon the deed of trust, dated July 30, 1927.

The validity of appellant's claim based upon the deed of trust is controlled by California law, as indicated above.

It is well settled under the law of this State that a power of sale in a deed of trust is never outlawed by the Statute of Limitations, and that the trustor cannot quiet title against the deed of trust without payment of the full amount owing thereunder regardless of the time which has elapsed from the date of maturity.

10 Cal. Jur.—Equity Sec. 50, 52; *Shimpones v. Stickney*, 219 Cal. 637; *Meets v. Mohr*, 141 Cal. 667; *Toule v. Santa Cruz Title Co.*, 20 Cal. App. (2d) 495; *Dool v. First Nat. Bank*, 207 Cal. 347; cf. *Puckhaber v. Henry*, 152 Cal. 419.

Section 2905, California Civil Code provides:

“Redemption from a lien is made by performing or offering to perform the act for the performance of which it is a security and paying or offering to pay the damages, if any, to which the holder of the lien is entitled for delay.”

See also: 18 Cal. Jur.—Mortgages, Sec. 513.

Under California law, the basic rule is that “enforcement of a power of sale contained in a deed of trust is never outlawed by the lapse of time alone.”

Welch v. Sec. First Nat. Bk. of L. A., 61 Cal. App. (2d) 632, 635, citing *Bank etc. v. Bentley*, 217 Cal. 644, 655.

See also: *Summers v. Hallam Cooley Ent.*, 56 Cal. App. (2d) 112; *Howell v. Dowling*, 52 Cal. App. (2d) 487, 497; *Jensen v. Duke*, 71 Cal. App. 210; *Barberi v. Rothchild*, 7 Cal. (2d) 537; *Sacramento Bk. v. Murphy*, 158 Cal. 390.

In *Flack v. Boland*, 11 Cal. (2d) 103, 106, the court said that despite the fact that the secured creditor could not bring a suit for foreclosure, he may, where the trust deed permits, foreclose by trustee's sale, and that the lapse of the statutory period on the principal obligation is no bar to such trustee's sale.

In *Hamaker v. Williams*, 22 Cal. App. (2d) 256, 257, the court said:

"It is well settled that the Statute of Limitations never runs against the power of sale in a deed of trust, that the title remains in the trustee until the debt is paid or the property sold, and that the power of sale may be enforced when otherwise the debt would be barred by statute. (*Travelli v. Bowman*, 150 Cal. 587,; *Sacramento Bank v. Murphy*, 158 Cal. 390; *Bank of Italy etc. Assn. v. Bentley*, *supra.*)"

25 Cal. Jur. 76, Sec. 61, sets forth the law as follows:

"While an action to foreclose a mortgage is barred by the Statute of Limitations when the debt to secure which it was given is barred, the expiration of the statutory time for bringing an action to enforce a personal obligation does not operate as an extinguishment or payment, and does not affect the title of the

trustee under a deed of trust, or extinguish the power of sale conferred upon him.”

Citing: *Travelli v. Bowman*, 150 Cal. 587; *Sacramento Bk. v. Murphy*, 158 Cal. 390; *Grant v. Burr*, 54 Cal. 298; *Roberts v. True*, 7 Cal. App. 379.

In the case at bar, therefore, the power of sale under the deed of trust dated July 30, 1927, was valid and subsisting on December 9, 1942, the date of the filing of the petition under Section 75 herein. Furthermore since the agreement of February 9, 1939, expressly acknowledged and reaffirmed the validity and continuing effect of the note of July 30, 1927, which is the same note upon which the deed of trust is based, the deed of trust itself was valid and subsisting and not barred by the statute of limitations on December 9, 1942.

Thus in the case at bar where the appellees seek in effect to quiet their title against the claim and lien of the appellant, it is submitted that as a matter of law that they are barred from obtaining such relief because the power of sale under the deed of trust can never be outlawed by the statute of limitations. And under the facts in the case at bar, it is submitted that the said deed of trust was an effective obligation on December 9, 1942, so that in the absence of the instant proceedings the appellant could have elected either to foreclose thereunder or to cause a trustee's sale to be made thereunder.

Under these circumstances the claim and lien of the appellant may and should be based on the full obligation due, including principal and interest up to December 9, 1942, under the deed of trust.

I-C

The claim of the appellant herein is valid and subsisting, as of December 9, 1942, by reason of the said promissory note of July 30, 1927.

Here too the determination of the validity of the claim is controlled by California law. Section 360 of California Code of Civil Procedure provides as follows:

“No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.”

As set forth above, on February 9, 1939, the declaration of trust #5873 was amended by an instrument in writing, executed by the parties hereto, which among other things acknowledged and reaffirmed the existence of said trust and continued it in effect unchanged except for new release prices on the subdivision lots. [Tr. pp. 182-186.] The said trust provides that:

“The Farm Home Builders, Incorporated are indebted to the Pan-American Bank of California as evidenced by one certain promissory note, copy of which is attached hereto, marked ‘Exhibit C’ and made a part of this Declaration of Trust . . .” [Tr. p. 276.]

The note attached as Exhibit C is the aforesaid note of July 30, 1927.

The scope of the trust is stated to be:

“To secure the payment of the indebtedness of the Trustor to Pan-American Bank of California in the

sum of \$45,000.00 and interest thereon, together with any renewal and/or renewals and/or extensions thereof.” [Tr. p. 277.]

The Trustee is empowered to apply funds

“to pay to the Pan-American Bank of California, as first payee, all subsequent collections received by the Trustee on account of the principal of the sale price of all lots sold until there shall have been paid to first payee the amount of the release price of the respective lot or parcel, as shown in the schedule of release prices set forth in Exhibit ‘F’, attached hereto and made a part of this declaration of trust, or until all sums due first payee, together with the interest thereon shall have been paid in full.” [Tr. p. 281.]

It is clear that by executing the agreement of February 9, 1939, the appellees were acknowledging their obligation under the note of July 30, 1927, in the form and manner provided by Section 360, California Code of Civil Procedure. Furthermore, in addition to this written acknowledgment, the said payment of \$1,264.08 on account of principal made in 1940, and the said payment of \$363.85 on account of interest also made in 1940, and the admitted acceptance by the appellees of the trustee’s annual statement covering the year 1940, and the letter of appellees dated August 9, 1942 [Tr. p. 273], all taken together surely establish an acknowledgment by appellees of their obligation under the note of July 30, 1927, within the meaning of Section 360, California Code of Civil Procedure.

As stated in *Van Cauteren v. Forger*, 45 Cal. App. (2d) 388, 392:

“It is well established that the Code Section does not prescribe any form in which an acknowledgment or promise sufficient to lift the ban of the statute of limitations shall be made. It is sufficient that it shows that the writer treats the indebtedness as subsisting and one which the Debtor is liable and willing to pay. From this acknowledgment, the law implies the promise to pay. (*Concannon v. Smith*, 134 Cal. 14, 20,; *Foster v. Bowles*, 138 Cal. 346, 351,; *Clunin v. First Federal Trust Co.*, 189 Cal. 248,)”

As stated in 11 California Law Review 130:

“ . . . it was early established that a new promise would be inferred from the fact of part payment of interest or principal.”

Bealy v. Greensladt (1831), 2 Crompt. & J. 61; *Hollis v. Palmer* (1836), 2 Bing. (N. C.) 713.

The English prototype of the American Statutes of Limitations, Lord Tenterden's Act, expressly provided that part payment of principal or interest should toll the statute. (9 Geo. IV, c. 14.)

This rule was approved in California as early as 1858. *Palmer v. Andrews*, 1 McAll. 491, Fed. Cas. #10683.

It has been reaffirmed both before and after the adoption of the codes.

Baron v. Kennedy, 17 Cal. 574; *Minifie v. Rowley*, 62 Cal. Dec. 611.

In *Clunin v. First Federal, etc. Company*, 64 Cal. Dec. 53, the rule was again approved, the Court stating that it was necessary that the payment or acknowledgment be made to the creditor. Since such was in the fact in the instant case, it clearly comes within the rule of the *Clunin* case.

And in *Aitube v. Aguire*, 39 Cal. App. Dec. 528, the Court held that the defense of the statute of limitations was also barred where the Debtor had given a note to the creditor as part payment on an obligation previously barred by the statute of limitations.

It has been held that while mere payments on account of an obligation barred by the statute of limitations are not sufficient to bar the defense of the statute, nevertheless, when such payments taken together with contemporaneous and subsequent letters and statements show an intention of the parties to treat such payments as an acknowledgment, that in such cases the appellees are barred from setting up the defense of the statute of limitations.

Wilson v. Walters, 66 Cal. App. (2d) 1.

It is also clear under the provisions of Section 360, California Code of Civil Procedure, that an *acknowledgment* of the obligation is all that is required; no actual promise to pay is necessary.

See *Foster v. Bowles*, 138 Cal. 346; *Curtis v. Holee*, 184 Cal. 726, 730.

Therefore, even if it be assumed that the note of July 30, 1927, was barred on February 9, 1939, nevertheless, the agreement of February 9, 1939, particularly in the

light of the payments made in 1940 and the account showing the same, as well as the appellees' letter of August 9, 1942, taken together necessarily constitute an acknowledgment of the said promissory note.

Since the within proceedings under Section 75 of the Bankruptcy Act were commenced on December 9, 1942, less than four years from the date of said agreement of February 9, 1939, it follows that the defense of the statute of limitations must fail herein, and the note be deemed valid and subsisting as of the date of filing said petition.

* * * * *

The District Court, in its opinion herein, held as follows:

“Thus in the case at bar where the language of the note specifically provides for interest ‘until paid,’ it would seem that the contract rate of interest should be applicable after maturity.” [Tr. p. 64.]

Apparently, the only obstacle to granting such interest is the finding in the next sentence that the right to that interest became barred with the expiration of the four-year period prescribed by the statute of limitations on July 30, 1936.

It appears that the agreement of February 9, 1939, although a part of the record before the District Court, was not considered by the Court in determining the continuing effectiveness of the declaration of trust.

In the light of that agreement, it is respectfully submitted that the declaration of trust, the deed of trust and the note were in full force and effect on the date of the filing of the petition under Section 75 herein on December 9, 1942, less than four years after the agreement of February 9, 1939.

POINT II.

The Appellant Being a Secured Creditor and Being the Sole Creditor and the Estate Being Ample to Pay the Entire Claim, as Well as Interest From and After the Filing of the Petition, Equity Requires the Payment of Interest From and After Filing Said Petition to the Appellant.

Let us first examine the ample character of the estate.

The sole assets of the appellees consist of certain real property in Leona Valley, Los Angeles County, California, consisting of about 3,000 acres, subject to a certain deed of trust and a certain declaration of trust.

The appellee Frank D. Hall stated in his testimony in the within proceedings on February 19, 1943, that after certain proposed sales were compelled there would be left approximately 760 acres of said above described land. [Rep. Tr. p. 420.]

The said appellee also stated he estimated the value of the aforesaid remaining property to be about \$80,000.00 in his testimony in the within proceedings on February 11, 1943. [Rep. Tr. p. 322.]

In July, 1943, pursuant to an order of the Honorable H. Sindely Laughlin, Conciliation Commissioner-Referee in the above entitled proceedings, certain portions of the aforesaid property were sold to complete the aforesaid sales mentioned above, and as a result there was received into Court the sum of approximately \$56,592.92. From this sum certain disbursements were authorized by the aforesaid Honorable Conciliation Commissioner-Referee leaving a net balance of \$49,878.38, which sum is now being held by the Citizen's National Trust and Savings

Bank as trustee herein, subject to the order of the above entitled Court. [Tr. p. 30.]

The order of the said Honorable Conciliation Commissioner-Referee, affirmed by the District Court, provides for the payment by appellees of \$23,921.52 on account of principal owing as of December 31, 1940, plus interest on the unpaid balance which existed on July 30, 1932, at the rate of 7% per annum to July 30, 1936, and no interest after July 30, 1936. The sum found to be due and owing on account of principal as of January 30, 1932, was \$35,600.96. Thus the total obligation of the appellees to the appellant as determined by order of court to date is \$33,834.23. [Tr. pp. 20-42 and p. 40.]

Pacific States Corporation contends that as of October 30, 1942, the appellees owed it the sum of \$55,479.75 [Tr. pp. 251-266], and that the appellees now owe it the aforesaid sum plus interest thereon at the rate of 7% per annum compounded quarterly, with unpaid interest becoming part of the principal and thereafter bearing like interest until all principal and interest shall have been paid.

If the debt of the appellees herein is deemed to be the amount claimed by Pacific States Corporation, the total sum now due Pacific States Corporation by said appellees is \$77,591.51, as of September 1, 1947. To satisfy this debt, there is now available the aforesaid sum of \$49,878.38, together with the aforesaid 760 acres of real property, which property is worth at least \$80,000.00, making the total assets available to satisfy the claim \$129,878.38. This sum is certainly ample to pay the full claim of the appellant.

In the case of *Vanston Bondholders Protective Committee v. Green, supra*, the Court, in discussing the subject of allowance of interest on interest of creditors' claims in bankruptcy proceedings said:

“ . . . but bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principals. *Heiser v. Woodruff*,,; *American Surety Company v. Sampsell*, 327 U. S. 272; *Pepper v. Litton*, 308 U. S. 295, 303-306 . . .

“ . . . When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. *cf. Board of Commissioners of Jackson County v. U. S.*, 308 U. S. 343; *Royal Indemnity Co. v. U. S.*, 313 U. S. 289 . . . But where an estate was ample to pay all creditors and pay interest even if the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditors rather than to the debtor. *Coder v. Arts*, 213 U. S. 223, 245; *Sexton v. Dreyfus*, 219 U. S. 339. See, also: *Johnson v. Norris*, 190 Fed. 459. Analogous principals have been applied to the liquidation of national banks. *White v. Knox*, 111 U. S. 784, 786-787, relied on in *Sexton v. Dreyfus, supra*, 345; *Ticonic National Bank v. Sprague*, 303 U. S. 406, 412-413.

“It is manifest that the touchstone of each decision on allowance of interest in bankruptcy and receivership has been a balance of equities between creditor and creditors or between creditors and the debtor. See *Sexton v. Dreyfus*, *supra*, 346. That the proceedings before us has moved from equity receivership through Sec. 77-b to Chapter X in the wake of statutory change does not make these equitable considerations here inapplicable. A Chapter X or Section 77-b reorganization court is just as much a court of equity as were its statutory and chancery antecedents. See *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 527.”

The award of interest on interest is supported in addition by the following non-bankruptcy cases:

Town of Genoa v. Woodruff, 92 U. S. 502; *Edwards v. Bates County*, 163 U. S. 269.

In the case at bar the appellant is the sole creditor of the appellees. The estate is ample to pay interest during the pendency of the bankruptcy proceedings.

In the case at bar there are many additional factors that recommend the exercise of judicial discretion in favor of allowing interest during the pendency of the within proceedings:

a. Since appellant is the sole creditor, and since it is a secured creditor, the allowance of such interest will not prejudice the rights of any other creditor and will merely carry out the original intention of the parties in applying the security to the satisfaction of the obligation of the appellees.

b. On the other hand to disallow interest to appellant from December 9, 1942, to date means that appellees will

have been given the use of at least \$33,834.23 for almost five years without any charge therefor. This is clearly inequitable.

c. An additional reason why interest should be allowed during the pendency of the instant proceedings is that the appellees filed a composition and extension proposal on April 2, 1943, in the within proceedings in which as one alternative they proposed an extension agreement whereby all proceedings to foreclose the aforesaid real property should be stayed until August 1, 1947, and that during the interim between April 1, 1943 and August 1, 1947, the appellees proposed to recognize the principal unpaid balance due appellant as \$50,000 and to pay interest on said sum at the rate of 4% per annum from and after August 1, 1944. [Tr. pp. 73-75.]

It appears equitable that the appellees should be required to pay a sum at least as great as that offered by them in their composition proposal. If the appellees would seek equity, they should not be permitted to do less in equity than they offered to do at the time of filing their extension proposal herein, particularly since even that proposal was deemed insufficient by the appellant.

The pendency of the instant proceedings has permitted the appellees to take advantage of the general rise in real estate values with the result that they are now able not only to pay off the entire indebtedness claimed by the appellant but to receive back a substantial refund or equity in the property in addition.

Surely it is equitable that if the appellant is to be permitted to take advantage of this increase in real estate

values, and if there is still sufficient money to pay the entire claim of the appellant with interest during the bankruptcy proceedings, that said interest should be allowed. This is particularly true when it is remembered that appellees have achieved a delay against the sale of the property under the deed of trust since November 4, 1940, when the aforesaid suit #457525 was filed by them in the Superior Court of Los Angeles County. Thus considering both the State Court action and the instant proceedings, the appellees have delayed said sale of said property for almost seven years. At the beginning of said seven-year period, the appellees had little or no equity in said property. Today even if the full claim of the appellant be allowed as prayed, the appellees have, nevertheless, a substantial equity in the property. It appears highly equitable, therefore, that since the appellees have paid no interest to the appellant during this period and since the appellant has been disabled from proceeding to sell the property or reimburse itself in any manner whatsoever from the sale thereof, that the appellant should receive interest during the period of the instant proceedings.

It is, therefore, respectfully submitted that in accordance with the authorities cited in the case of *Vanston Bondholders Protective Committee v. Green, supra*, and in accordance with the equities of the instant case, that interest should be allowed to the appellant during the instant proceedings. It is further respectfully submitted that the denial of such interest by the District Court is contrary to the law and an abuse of discretion under the facts here involved.

POINT III.

The Judgment in the Case of Hall v. Citizens National Bank, 53 Cal. App. (2d) 625, Is Res Judicata That the Obligation of Appellees Was Valid and Existing Under the Declaration of Trust and the Deed of Trust on November 4, 1940, and That the Appellant Had Not Waived and Was Not Estopped From Enforcing the Same.

The appellees and the appellant were adverse parties in the State Court proceeding. The issue involved was whether or not the appellees were entitled to injunctive relief against a foreclosure sale of the real property in issue herein under the said deed of trust as amended, and against a sale under either said deed of trust or said declaration of trust.

The validity and continuing effect of the declaration of trust and of the deed of trust and the note were the matters in issue. The appellees admitted in their verified complaint that the declaration of trust and deed of trust and the note were in full force and effect:

“From and after July 30, 1932, and continuously up to on or about November 1, 1939, defendants, Title Company and Citizens Bank, and the Pan-American Bank in Liquidation, and thereafter to on or about June 1, 1940, said defendants, Title Company and Citizens Bank, continued to receive payments derived from the proceeds of the sale of real property and to apply same in the reduction of the principal sum of said note, and the payment of interest thereon in the same manner and according to the same practice which had been adopted and used by the Citizens Bank and Title Company, and each of them, prior to July 30, 1932, and said Title Company and Citi-

zens Bank and the plaintiffs continued to operate under the respective Trusts (Deed of Trust dated July 30, 1927, and Trust No. 5873), after July 30, 1932, in the same general manner as prior thereto." (*Ibid.* pp. 8-9.) [Tr. p. 121.]

Appellees further admitted in said verified complaint that with respect to the aforesaid trust amendment of October 28, 1935:

" . . . except for the change in the schedule of minimum selling and release prices, each and all of said parties continued to operate under said declaration of trust No. 5873 in the same manner as they had operated prior to July 30, 1932." (*Ibid.* p. 9.) [Tr. p. 122.]

Similarly, with respect to the aforesaid trust amendment of February 9, 1939, appellees alleged and admitted that:

" . . . it was then the continuing mutual plan, purpose, intention, program and policy of the parties to said amendment and the Title Company that the plaintiffs, Frank D. Hall and Marguerite S. Hall, should continue to sell and dispose of the real property described in said deed of trust, and that from the proceeds derived from such sales, payments SHOULD BE MADE ON SAID NOTE IN THE REDUCTION OF THE PRINCIPAL SUM AND IN THE PAYMENT OF INTEREST; and that except only for the change in the schedule of release prices, the parties thereto, and the Title Company, were to and should continue to act and perform their respective duties and functions under said declaration of trust in the same manner and for the same purpose as prior to July 30, 1932" (*Ibid.*, p. 10, lines 5-16.) [Tr. p. 123.]

Appellees contended in said complaint that appellant and the trustee, Citizens Bank, had waived payments of principal and interest and, therefore, were estopped from declaring appellees to be in default for failure to pay the same.

The issue before the Superior Court, as well as before the District Court of Appeal, was whether or not there had been a waiver or estoppel by the appellant or the trustee so as to bar appellant from its right to receive the entire sum including principal and interest provided in the obligation.

It is respectfully submitted, therefore, that the judgment of the District Court of Appeal in that case (53 Cal. App. (2d) 625), being a final judgment, is *res judicata* on the following issues:

1. That the declaration of trust as amended and the deed of trust and the note were in full force and effect as of November 4, 1940, the date of filing the Superior Court action.

2. That neither the appellant nor the trustee, Citizens Bank, had waived the payment of any sum of principal or interest on said declaration of trust as amended, said deed of trust or said note.

3. That there was no ground whatsoever for enjoining or restraining the appellant or said trustee from proceeding to a trustee's sale under the declaration of trust as amended, or the deed of trust, and to reimburse itself in full for principal and interest to date out of the proceeds of said sale.

The District Court of Appeal held that the Superior Court had “. . . further erred in holding that no sale under the declaration of trust could be made for failure to pay principal or interest.”

The District Court of Appeal further held that “. . . on November 13, 1939, taxes, principal and interest were in default.” (53 Cal. App. (2d) 625, 638.)

In effect, appellees now seek to litigate all these issues once again in the Federal Court proceedings under Section 75; we respectfully submit that the parties and the issues being the same, the prior State Court suit is *res judicata*.

This is in conformity with the State law of California: Code of Civil Procedure, Sections 1908, 1910 and 1911.

This is equally in conformity with the Federal law applied to bankruptcy proceedings. See: *In re Paula Bldg. Corp.*, 86 F. (2d) 657.

It has been similarly held that decrees of a State Court are binding on a trustee in bankruptcy in a subsequent plenary action involving the same defendants and substantially the same issues.

Detroit Trust Company v. Schantz, 16 F. (2d) 943; *Throckmorton v. Hickman*, 279 Fed. 196; *Life Ins. Co. & Burgoine v. Drake*, 214 Fed. 536; *MacDonald v. Guy*, 63 F. (2d) 334; *West v. Central Union Trust Co.*, 2 F. (2d) 585.

It has been held in *Pacific Hotel Apt. Co. v. Arcady-Wilshire*, 89 F. (2d) 248, that a prior decree dismissing a grantee's prior action to enjoin an impending trustee's

sale of real property was *res judicata* and estopped the grantee from thereafter maintaining an action against the trustee and purchaser at trustee's sale where the issue in both cases was the validity and continuing existence of the deed of trust. (See also, *Northern Pac. R. R. Co. v. Shaght*, 205 U. S. 122.)

The application of the law of *res judicata* to the case at bar is somewhat similar to that involved where there has been a removal of a case to a Federal Court from a State Court after procedural or substantive of rights between the parties have been finally determined by a judgment or order of the State Court.

In such cases the general rule is that the judgment or order of the State Court is binding upon the Federal Court.

Duncan v. Degan, 101 U. S. 810; *Brooks v. Farwell*, 4 Fed. 166; *Guernsey v. Cross*, 153 Fed. 822; *Allmark v. Platte S. S. Co.*, 76 Fed. 615; *Hoyt v. Ogden Port. Cem. Co.*, 185 Fed. 889; *Lookout Mt. R. R. Co. v. Houston*, 44 Fed. 449; *Phoenix Ins. Co. v. Charleston Bridge Co.*, 65 Fed. 628; *Loomis v. Carrington*, 18 Fed. 97; *Denison v. Shawmut Min. Co.*, 124 Fed. 860; *Savel v. So. R. Co.*, 93 F. (2d) 377; *Wann v. National Lead Co.*, 27 F. Supp. 217.

The application of the doctrine of *res judicata* to the case at bar is in harmony with the cases decided in the State of California. In *Denio v. Huntington Beach*, 22 Cal. (2d) 580, it was held that a judgment upholding the validity and binding effect of a contract of employment calling for payment of attorney's fees of percentages of certain royalties received by the defendant was *res judicata*

on the issues of frustration, *ultra vires*, failure of consideration, fraud, gift, and exemplary damages raised by the defendant in a later action against it to recover such royalty payments subsequently received by the defendant.

In holding the doctrine of *res judicata* applicable, the Court said:

“Nor do we think the cause of action herein is so essentially different, in a sense material here, from that set forth in the former action as to avoid the effect of the usual rule against the splitting of defenses. As was said in *Panos v. Great Western Packing Company*, 21 Cal. (2d) 636, 134 P. (2d) 242, 244: ‘The cause of action is simply the obligation sought to be enforced.’ In a very real sense this action involves the same obligation which was litigated in the former action. The obligation sought to be enforced in this action, as well as in the former action, is that of the contract for compensation for legal services. If that contract is valid and enforceable to the extent of requiring the payment of a percentage of moneys received from a certain source for a certain period, it would be entirely inconsistent to hold that a judgment upholding that contract for a part of the period provided for had no binding effect on the claim for compensation for the remainder of the period covered by the contract. The validity and binding effect of the contract for services was the basic issue in the former action and is the basic issue in the present issue. In *Sutphin v. Speik*, 15 Cal. (2d) 195, P. (2d) 652, 101 P. (2d) 497, the validity of an assignment was the basic issue in the case cited although somewhat different facts were involved. In holding that the judgment in the first action was *res judicata* the court said: ‘After that judgment became final, plaintiff’s right to a portion

of the production from those wells was conclusive as between the parties, even in the present suit on a different cause of action, because the basic issue thus decided in the first case is identical with that in the present case.' In *DeHart v. Allen*, 26 Cal. (2d) 829, 161 P. (2d) 453, a judgment in a former action was held *res judicata* since issues as to the validity and binding effect of a certain lease either were raised or could have been raised in the prior action.

"Moreover, facts were settled in the former action, which was between the same parties, which are controlling here, namely, the execution, validity and binding effect of the contract for services between these parties. The validity and binding effect of that contract was actually litigated and determined in the former action. As was said in *In re Estate of Clark*, 190 Cal. 354, 212 Pac. 622, 625, a 'judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far, as it settles and determines questions of fact. 23 Cyc. 1288-1290. It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. *Freeman on Judgments*, Secs. 249 and 253; *Lamb v. Wahlenmaier*, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; *Reed v. Cross*, 116 Cal. 473, 484, 48 Pac. 491; *Atchison T. & S. F. R. Co. v. Nelson*, 9 Cir., 220 Fed. 53, 135 C. C. A. 621. That is to say, 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law,

chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.' Bigelow on Estoppel, pp. 110, 111, 112; *Rauer v. Rynd*, 27 Cal. App. 556, 150 Pac. 780."

And in *Olney v. Cavell*, 138 Cal. App. 233, 32 P. (2d) 181, 182, the Court said:

"This case seems to come squarely within the meaning of section 1911 of the Code of Civil Procedure. The same question between the same parties being necessarily involved in the present case, the former adjudication was conclusive 'not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy * * * which also might have been raised and decided.' *Minnis v. Equitable Life Assur. Soc.*, 204 Cal. 180, 183, 267 Pac. 538, 539; *In re Estate of Bell*, 153 Cal. 331, 95 Pac. 372; *Elm v. Sacramento Suburban Fruit Lands Co.*, 217 Cal. 223, 17 P. (2d) 1003. 'It is not what was actually done, but what might have been done, that is concluded by a former judgment.' *Henderson v. Miglietta*, 206 Cal. 125, 127, 273 Pac. 581, 582.

"The basic facts and the existence of the obligation here sued upon have been judicially determined and the final judgment in the former action is controlling here. A contrary decision here would have destroyed the rights of the respondents in a contract, the validity and binding effect of which was upheld in the former action."

Not only is the instant suit governed by the determinations of fact in the prior State Court action, but it is respectfully submitted that the doctrine of *stare decisis* is applicable herein to the extent that determinations of law made on such facts as were decided by the State Court action are equally binding here.

The rule is similar to that announced in *Gore v. Bingham*, 20 Cal. (2d) 118, in which the Court said:

“Where a question of law once determined is sought to be relitigated upon a second appeal to the same appellate court, it is equally established that the first determination is the law of the case and will not be re-examined in the absence of unusual circumstances leading to injustice or unfairness even though the issue sought to be raised involves the jurisdiction of the court in the prior appeal.”

As stated in *Slater v. Shell Oil Co.*, 58 Cal. App. (2d) 864:

“The text writers are not in accord whether the doctrine applicable is *res judicata*, estoppel, merger of judgment, or election of remedies. The latter doctrine is an ‘extension of the law of estoppel.’ *Mailhes v. Investors Syndicate*, 220 Cal. 735, 738, 32 P. 2d 610, 611. Merger of judgments is also an application of the same doctrine. *Res judicata* has many of the features of estoppel particularly when based upon the same cause of action. Whatever the doctrine applicable all unite in the principle that one who has had his day in court should not be permitted to further vex his adversary by a

subsequent action for the same relief. *Panos v. Great Western Packing Co.*, Cal. Sup., 134 P. 2d 242.”

Since the principal object in the former State Court action was to obtain a determination as to whether or not the declaration of trust as amended and the deed of trust were valid and in effect, and whether or not the appellees were in default thereunder, and whether there had been any waiver of principal or interest by the appellant or by the trustee, Citizens Bank, and since all those issues were determined, it is respectfully submitted that in the light of the foregoing authorities those issues cannot be relitigated.

It has been held that where the right of a litigant in a certain trust has once been determined, a later suit affecting substantially the same issue was barred by the former action. *Papineau v. Sec. First Nat. Bank of L. A.*, 45 Cal. App. (2d) 690.

In *Detweiler v. Clune*, 77 Cal. App. 562, plaintiff attempted to rescind a contract on two grounds, fraud and failure of consideration. Having failed in that action, he then sought to recover the money paid by him under the contract on the ground of failure of consideration. The court held the two actions were the same, notwithstanding the fact that the prior action was for rescission and the subsequent action was for recovery upon a consideration that had failed.

The *Papineau* case, *supra*, quotes with approval from Freeman on Judgments, Fifth Edition, Sec. 672, pages 14-18, as follows:

“If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action, it is *res judicata* when it comes again in issue in another action between the same parties, though the immediate subject matter of the actions be different.”

In *Wright v. Sec. First Nat. Bk.*, 35 Cal. App. (2d) 264, the court, in a case involving a subdivision trust similar to that involved in the case at bar, held that where trust beneficiaries had failed to present their claim of interest for equity in the land conveyed by them to the trustee, in a prior trustee's action to foreclose the pledge of their beneficial interest in the trust, they were estopped to litigate such question in a subsequent ejection action brought by them against the trustee.

In *Birkhofer v. Krumm*, 27 Cal. (2d) 513, it was held that in an action for a deficiency judgment under a deed of trust pleadings and findings in a previous action by the same plaintiffs and their predecessor in interest against the same defendant to recover on an independent guaranty contract originally comprised in an extension agreement were admissible as *prima facie* evidence of default under the obligation of the deed of trust where such finding was responsive to the issue and material in both cases.

The court said:

“The findings in respect on default on the note here involved were not outside the issues, Case #37019, but were responsive to issues made by the pleadings in that case and indeed the making of them was essential to the application of the *ratio decidendi* there, for unless it were found that there had been a default in one or more payments on a note, there would have been no occasion in that case to consider whether or not the alleged guaranty there insisted upon was effective as such or not.”

Similarly, in the case at bar, the judgment of the District Court of Appeal is binding on the issue that the appellees were in default under the declaration of trust on November 13, 1939 (53 Cal. App. (2d) 625-638). To make such a finding, the court must have necessarily have found that the said declaration of trust was valid and existing as of said date. And that determination is, we submit, binding in the case at bar.

Furthermore, under the authorities cited above, it is clear that the State Court action is also determinative of the validity and existence of the trust as of November 4, 1940, against any and all other objections that the appellees might have urged against the same, even though such objections were not urged in the State Court action. For, to use the oft repeated expression, “Our courts will not permit piecemeal litigation.” Thus the judgment of the State Court is determinative of all defenses which

might have been raised by the appellees, including the defense of the statute of limitations, although that particular defense was not in issue in the State Court proceedings.

The Federal Court in the case at bar is a court of equity and the application of the doctrine of equitable estoppel of *res judicata* is particularly appropriate herein. Surely the appellees should not be permitted to deny the verified allegations and admissions in their complaint in the former State Court action by introducing the issue of statute of limitations in the instant proceedings, although the validity and continuing existence of the trust were admitted in the State Court action. After preventing the appellant for two years through the State Court action from conducting a trustee's sale of the trust property and after thwarting the possibility of such sale for the next five years by the instant proceedings, can the appellees in equity and good conscience be permitted to relitigate the issues already determined in the State Court or to alter their position established in their verified pleadings in the State Court action? It is respectfully submitted that as a matter of law, the doctrine of *res judicata* is applicable as hereinabove set forth, and it is further submitted that under the principles which govern the administration of justice in a court of equity, the appellees should be estopped from relitigating the aforesaid issues in the case at bar.

POINT IV.

There Is No Evidence of a Waiver of Estoppel With Respect to Payments of Principal or Interest Sufficient to Sustain the Judgment of the Lower Court.

The District Court, in its opinion, states as follows:

“The Commissioner found that Citizens Bank in its capacity as trustee prepared and rendered accounts of all collections, disbursements and distributions during the years 1933-1940, inclusive, and that each account set forth a statement of the unpaid balance of the promissory note obligation; that these accounts did not set forth any charge for or payment of interest; that the accounts were furnished to debtors and to the state officials in charge of the liquidation of the Pan-American Bank, and were accepted by them as true and correct; that acceptance of the accounts evidenced an intention on the part of the liquidator of Pan-American Bank to waive interest, and interest was so waived. As conclusions of law from these findings of fact, the Commissioner held that Citizens Bank, as trustee, and the liquidator of Pan-American Bank were estopped to claim interest after July 30, 1936, and that this estoppel applied to petitioner.

“There is ample evidence to sustain the Commissioner’s findings and there is no error in the conclusions of law drawn therefrom. Indeed, it was not necessary to find that petitioner is estopped to claim interest, since both the principal obligation and all interest became barred by the California statute of limitations on July 30, 1936.” [Tr. pp. 62-63.]

The bar of the California statute of limitations does not apply to the instant case by reason of the aforesaid agreement of February 9, 1939, acknowledging and re-affirming the declarations of trust and note contained therein.

It remains to be seen whether or not there is sufficient evidence to sustain the findings and conclusions with respect to the waiver or estoppel of interest payments.

We have demonstrated in Point I above that the agreement of February 9, 1939, acknowledges and re-affirms declaration of trust No. 5873. Other than changed prices for the lots, the original provisions of the trust are preserved intact. This in itself should be ample evidence that there was no intention of the parties to waive any payments of principal or interest up to and including February 9, 1939.

Furthermore the trust itself expressly provides that the acceptance of any particular payment shall not be deemed a waiver of any other payment or payments therefore due. [Tr. pp. 289-290.]

We have in addition indicated that there has been no waiver or alteration of the rights of the parties by any executed oral agreement or by any written agreement. The record is bare of any specific evidence of waiver.

It has also been demonstrated that the appellees in the prior Superior Court action argued the issue of waiver of interest and that this issue was determined adversely to them. We have set forth in Point III above our reasons for submitting that the former State Court action is *res judicata* herein on this issue.

Another reason against a holding of waiver with respect to interest payments is that according to the opinion of the District Court herein the question of waiver only arises if it be first determined that the obligation of the appellees was barred by the statute of limitations on December 9, 1942. [Tr. p. 64.]

Since the agreement of February 9, 1939, removes the bar of the statute of limitations, it follows that pursuant to the reasoning of the District Court opinion herein the issue of waiver must be determined adversely to the appellees.

Furthermore this being an equitable proceeding, appellees should be precluded from claiming a waiver of interest where to do so would, if the judgment of the District Court herein be followed, result in the payment of a lesser sum to the appellant (\$33,834.23), than that offered by the appellees in their composition and extension proposal of April 2, 1943 (\$50,000.00 payable August 1, 1947, together with 4% interest per annum thereon commencing August 1, 1944). [Tr. pp. 74-75.]

The only pretext claimed by appellees for a waiver of interest is that the periodic statements of account of the trustee did not calculate the interest owing prior to 1942 and, therefore, did not add the unpaid interest to principal in said periodic statements.

It is submitted that these periodic statements cannot have had the effect of a waiver of payment of interest prior to February 9, 1939, by reason of the express agreement of the parties on that date reaffirming trust No. 5873 in its entirety including the obligation to pay interest.

It is further submitted that the appellees are estopped to claim such waiver of interest in the instant proceedings by reason of the fact in the aforesaid State Court action appellees admitted on verified complaint that the trustee, Citizens Bank, up to June 1, 1940 “. . . continued to receive payments derived from the proceeds of the sales of real property and to apply the same in the reduction of the principal sum of said note and the payment of interest thereon the same manner and according to the same practice which had been adopted and used by the Citizens Bank and Title Company, and each of them, prior to July 30th, 1932, and said Title Company and Citizens Bank and the plaintiffs continued to operate under the respective Trusts (Deed of Trust dated July 30th, 1927 and Trust No. 5873) after July 30th, 1932 in the same general manner as prior thereto. [Tr. p. 121.]

A further reason why appellees should be precluded from claiming a waiver of any interest is found in their further pleading in said complaint, referring to the aforesaid amendments of declaration of trust dated October 28, 1935, and February 9, 1939, “. . . that when each of said amendments was adopted, agreed to and executed, it was the mutual plan, purpose, intention, program and policy of all of the parties thereto and of the Title Company that notwithstanding the maturity date set forth in the promissory note, the time of payment of such promissory note should be suspended, extended and continued until such time and times as payment thereon could be made from the proceeds of sales of parcels of real property according to the respective minimum selling prices and release prices set forth from time to time, until the

sale of sufficient parcels of real property should be made to realize enough funds with which to pay said note; and that such mutual understanding continued uninterruptedly until on or about June 1st, 1940.” [Tr. p. 123.]

Furthermore appellees alleged in said complaint with reference to the aforesaid amendments of the declaration of trust: “. . . that it was then the continuing mutual plan, purpose, intention, program and policy of the parties to said amendment and the Title Company that the plaintiffs, Frank D. Hall and Marguerite S. Hall, should continue to sell and dispose of the real property described in said Deed of Trust and that from the proceeds derived from such sales, payments should be made on said note in reduction of the principal sum *and in payment of interest*; . . .” [Tr. p. 123.] (Italics ours.)

Since the appellees relied primarily upon the periodic statements of account furnished by the said trustee, it is vital to recall that the 1940 statement of account reflects the payment of \$1,264.08 on account of principal and \$363.85 on account of interest. [Tr. p. 305.] And both the Conciliation-Commissioner and, impliedly, the District Court have found that the 1940 statement of account was accepted as true and correct by the appellees. The Conciliation-Commissioner found: “For the years 1939 and 1940 the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account.” [Tr. p. 28.]

It is clear that the reason why the statements of account for the years *prior* to 1940 did not reflect any

payments of interest is that there was not even sufficient money derived from the subdivision sales to make payment of the principal obligation much less the interest obligation and that is the only conceivable reason for the lack of computation of interest.

There is no statement in the periodic statements of account whereby the trustee purports to waive payment of interest. Nor was it within the province of the trustee to waive such payments.

The conduct of the parties can thus be ascertained by examining the statement of 1940 which was admittedly the most recent of the periodic statements and was admittedly acquiesced in by the appellees. [Tr. pp. 300-306 and p. 305.] Since this statement recites payment of interest, it may be inferred that the conduct of the parties was such as to evidence an intention of the obligation to pay interest still existed.

As stated in *Moore v. Wood*, 26 Cal. (2d) 621, "The practical interpretation of a contract by the parties constitutes cogent evidence of intent (*Roy v. Salisbury*, 21 Cal. 2d 176, 184, 130 P. 2d 706; *Tanner v. Title Ins. & Trust Co.*, 20 Cal. 2d 814, 823, 129 P. 2d 383; *Commercial Discount Co. v. Cowen*, 18 Cal. 2d 610, 116 P. 2d 599)."

The position of the appellant with respect to the principal and interest due from appellees was made clear to appellees by the computation of August, 1942. [Tr. pp. 251-256.]

We respectfully submit that in view of the law and the evidence set forth above there is no sufficient evidence of any waiver of interest by the trustee or by the appellant herein.

POINT V.

Appellees Do Not Have a Sufficient Interest in the Real Property in Question to Maintain the Instant Proceedings Under Section 75.

It is conceded that prior to the execution of the note, the deed of trust and the declaration of trust herein title to the real property had been conveyed by the appellees to Farm Home Builders, a corporation. [Tr. p. 25.] Farm Home Builders has been and is wholly owned and controlled by the appellees. [Tr. p. 25.] Because of this, the Conciliation-Commissioner and the District Court have found that the corporation was the *alter ego* of the appellees. [Tr. p. 58.]

The declaration of trust No. 5873 was executed by Farm Home Builders as owner of the real property. [Tr. p. 25.] Similarly, the amendments to the trust of October 28, 1935, and February 9, 1939, were executed by the corporation as owner of the property. [Tr. pp. 176-185.]

The trust prohibits a sale of any interest thereunder unless and until the same shall have been accepted by the trustee. [Tr. pp. 286-287.] It is conceded that although the corporation purported to assign its interest to the appellees on December 12, 1932, when it was legally disfranchised, such transfer has never been accepted by the trustee or by the appellant.

The sole interest of the Farm Home Builders under the trust is to receive the surplus, if any, of the proceeds of a trustee's sale or sales thereunder subject to other prior claims set forth in the trust. [Tr. p. 283.]

The sole rights of the appellees under said trust are to live on the property and manage the subdivision sale of same and to receive a commission of 30% for the sale of the trust property approved and consummated by the trustee—so long as Farm Home Builders was not in default. [Tr. pp. 281, 284.]

Under these circumstances, the question of whether or not a debtor has any property rights in the land in issue is to be determined under state law.

Jelks v. Aetna Life Ins. Co., 134 F. (2d) 870 (C. C. A. Okla.); *Hoyd v. Citizens Bank, supra*; *U. S. Nat. Bk. of Omaha v. Pamp, supra*; *McLean v. Federal Land Bank*, 130 F. (2d) 123, 127; *In re Kofoed*, 46 Fed. Supp. 118.

If he has no such right under local state law, he cannot maintain a proceeding under Section 75.

Jelks v. Aetna Life Ins. Co., supra; *Bernards v. Johnson* (C. C. A. 9), 103 F. (2d) 567, 571; *Wright v. Union, etc. Co.*, 304 U. S. 502; *In re Knauft*, 10 Fed. Supp. 785 (D. C. So. D., Calif.); *In re Fañer*, 11 Fed. Supp. 555; *In re Lettich*, 10 Fed. Supp. 346 (D. C. Mich.); *Summers v. Rice*, 141 F. (2d) 310 (C. C. A. Mo.); *In re Wilke*, 42 Fed. Supp. 1021 (D. C. Pa.); *In re Boehme*, 41 Fed. Supp. 426 (D. C. Mont.); *Federal Farm Mort. Corp. v. Davis*, 132 F. (2d) 501 (C. C. A. Calif.); *Fallbrook Public Utility Dist. v. Cowan*, 131 F. (2d) (C. C. A. Calif.), cert. den. 320 U. S. 735; *In re Chrisman*, 35 Fed. Supp. 282 (D. C. Calif.).

The sole interest of the appellees in the property was only the limited right to live on the land and to receive certain commissions from its sale.

In fact under the circumstances even the interest of the *corporation* may be deemed to be no more than personal property.

Wright v. Sec. First Nat. Bk., 35 Cal. App. (2d) 264; *Ward v. Waterman*, 85 Cal. 488; *Craven v. Dominguez Estate Co.*, 72 Cal. App. 713; *Finnie v. Smith*, 83 Cal. App. 707; *Houghton v. Pac. etc. Bank*, 111 Cal. App. 509; *Smith v. Bank of America*, 14 Cal. App. (2d) 78; and *Bank of America v. Sparr Realty*, 20 Cal. App. (2d) 10.

It is, therefore, respectfully submitted that in the light of the foregoing authorities the *appellees*, as distinguished from the corporation, have no sufficient interest in the property to maintain the within proceedings under Section 75.

In re Tracy, 80 F. (2d) 9; *U. S. Natl. Bank v. Pamp*, 83 F. (2d) 493; *In re Nossman*, 22 Fed. Supp. 645; *In re Hageman*, 10 Fed. Supp. 716; *Bastian v. Erikson*, 114 F. (2d) 338.

This issue was first placed before the court on the petition for review from the order of the Conciliation-Commissioner of August 1, 1944. It is a different proposition from whether or not the appellees were farmers as such, which issue was previously before the court.

The determination that the appellees were farmers does not necessarily mean that the appellees had a sufficient interest in the property to maintain the within proceedings. And it is submitted that in the light of the foregoing authorities the appellees have no such interest in the property and that the instant proceedings should be dismissed.

POINT VI.

The Determination of the Validity and Amount of Appellants' Secured Claim, Including Interest Up to December 9, 1942, Is a Matter of Right and Not a Matter of Judicial Discretion.

- A. Even if the Allowance of Interest Up to December 9, 1942, Herein be a Matter of Judicial Discretion, There Was an Abuse of Such Discretion by the Failure to Allow Interest in Accordance With the Provisions of the Obligation From Its Inception to December 9, 1942.

It appears conceded by the District Court in its opinion herein that if the declaration of trust was not barred by the statute of limitations on December 9, 1942, interest will be allowed from the inception of the obligation to that date as a matter of right. The opinion of the District Court states:

“ . . . and the weight of the authority is that where the rate of interest is specified in the note, that rate continues after maturity and until paid.

“Thus in the case at bar, where the language of the note specifically provides for interest ‘until paid’ it would seem that the contract rate of interest would be applicable after maturity.” [Tr. pp. 63-64.]

It is only where the obligation has been barred by the statute of limitations that the amount of principal and interest which appellees must pay to remove the lien on their property rests within the sound discretion of the Court. [Tr. p. 62.]

Section 75-k of the Bankruptcy Act imposes certain limitations in respect to farmer-composition proposals and provides that such composition or extension shall not reduce the amount of or impair the lien of any secured creditor below the fair market value of the property securing any such lien at the time of acceptance although future rates of interest may be reduced.

Thus even where the farmer can persuade a sufficient number of his creditors to approve a composition proposal he may not impair the lien of a secured creditor below the limit stated above.

If the decision of the District Court be affirmed, the lien of the appellant will be impaired below the limit stated above. For, as stated in Point II above, the reasonable market value of the cash and real estate securing the lien of the appellant is in excess of \$129,000 and the total lien claim of the appellant as of September 1, 1947, is only \$77,591.51.

Furthermore we have demonstrated in Point I under the authority of *Vanston Protective Bondholders Committee v. Breen, supra*, and cases there cited, that the determination of the validity and amount of a claim in the absence of controlling federal law was determined by state law. And we submit that we have demonstrated that under California law the claim of the appellant requires the allowance of interest from the inception of the obligation at least until December 9, 1942.

A.

Even if the allowance of interest up to December 9, 1942, herein be a matter of judicial discretion, there was an abuse of such discretion by the failure to allow interest in accordance with the provisions of the obligation from its inception to December 9, 1942.

The order of the Conciliation-Commissioner affirmed by the District Court allows interest as provided in the note up to the date of maturity of the note, and simple interest at the rate of 7% per annum for four years thereafter, to-wit: until July 30, 1936, *and no interest thereafter*. Thus if this Court affirms the judgment of the District Court, it is depriving the appellant of any interest for consideration for the use of its money (\$33,834.23 according to the District Court) *for more than eleven years*. It is permitting the appellees to have the free use of that money for said entire period.

We respectfully submit that this is extremely unequitable and contrary to the spirit and purpose of Section 75 of the Bankruptcy Act. (See Sec. 75-i.)

The inequity of this situation is particularly aggravated in view of the fact that appellant is the sole creditor of appellees.

The inequity of the disallowance of interest is more apparent when it is considered that since November 4, 1940, to and including the present time the appellees have by the prior State Court action and the instant proceedings prevented the appellant from causing said property to be sold to satisfy its lien.

Furthermore, in view of the admissions in the aforesaid pleadings in the State Court action, and particularly in

view of the offer of the appellees in their composition proposal of April 2, 1943, to recognize and pay the principal indebtedness in the sum of \$50,000 as of August 1, 1947, together with interest thereon at the rate of 4% per annum from August 1, 1944, it appears highly inequitable to permit them to pay less to clear their property of the lien of the appellant than they voluntarily offered in equity and good conscience to pay in their said proposal.

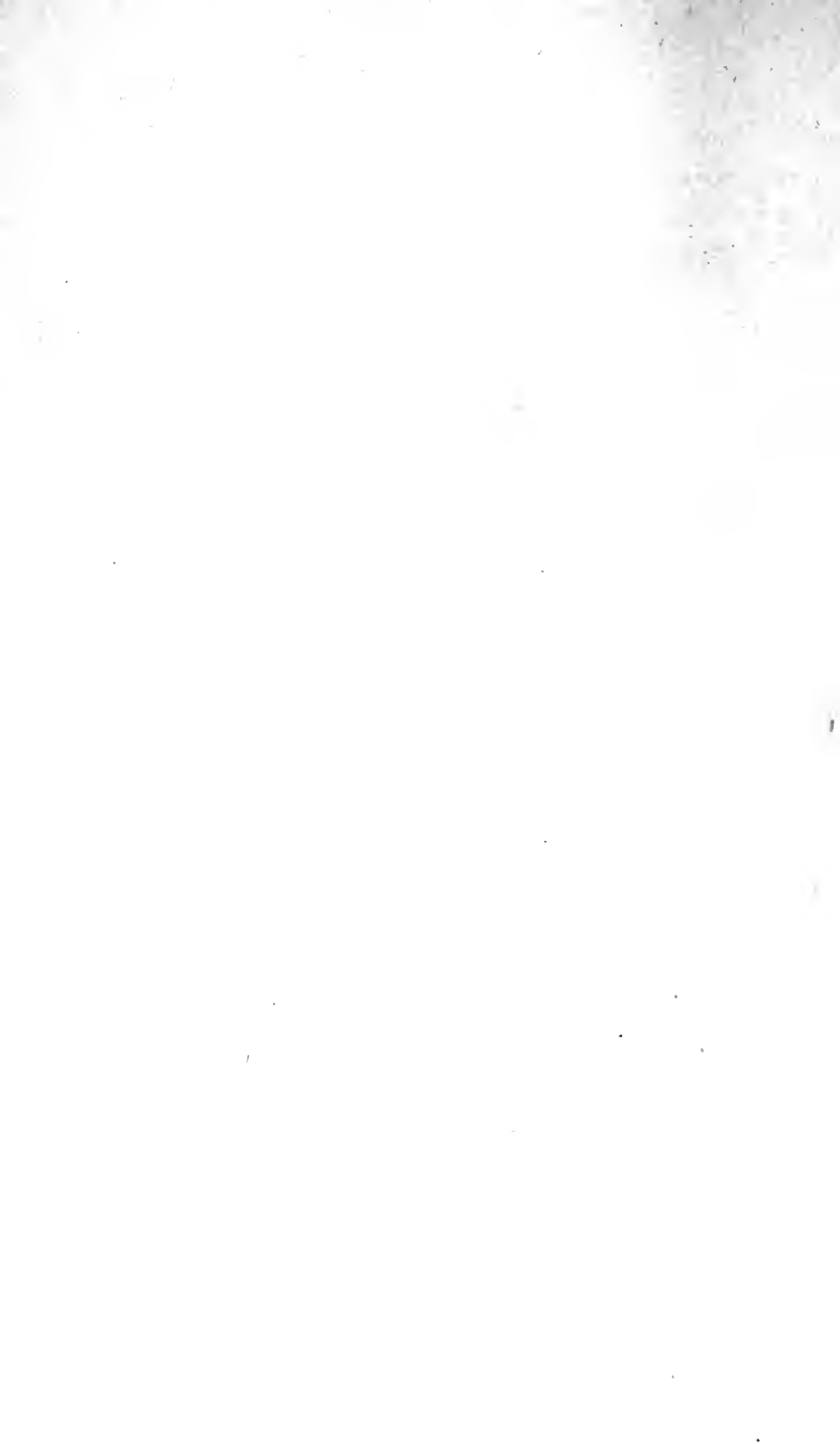
It is, therefore, respectfully submitted that even if the allowance of interest on the claim of the appellant up to December 9, 1942, be deemed a matter of judicial discretion that, nevertheless, "to do equity" appellees should be required to pay interest on the obligation at least up to and including December 9, 1942. To allow less, we submit, was at least an abuse of discretion, if not the impairment of a substantive right.

Respectfully submitted,

GEORGE T. GOGGIN and

MARVIN WELLINS,

Attorneys for Appellant.



No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

APPELLEES' BRIEF.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

C. P. VON HERZEN,
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DEC 5 1940



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No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

APPELLEES' BRIEF.

Statement of the Case.

Appellees accept the appellant's statement of the case, with the following additions:

On January 14, 1943, appellant filed a "Petition for Dismissal" of the Farmer-Debtor Relief Proceedings [Tr. p. 308].

On May 11, 1943, the Commissioner denied said petition for dismissal in its entirety [Tr. p. 309]. No review was taken from this order and it became final.

On September 14, 1943, Citizens National Trust & Savings Bank of Los Angeles, Trustee under Declaration of Trust No. 5873, filed a "Petition for Dismissal" of the Farmer-Debtor Relief proceedings [Tr. pp. 311-312].

On January 29, 1944, the Commissioner, by his order, dismissed the last mentioned petition [Tr. pp. 318-319].

A petition for review of the decision of Commissioner, last referred to, was filed in the United States District Court on February 8, 1944 [Tr. pp. 320-323].

The Review was heard by Honorable J. F. T. O'Connor, United States District Judge, and on August 29, 1944, Judge O'Connor affirmed the order and judgment of the Conciliation Commissioner dismissing the petition of Citizens National Trust & Savings Bank of Los Angeles, Trustee [Tr. p. 324]. No appeal was taken from the order of Judge O'Connor.

In its appeal from the order of the Commissioner, of August 1, 1944, in which the Commissioner determined the existing lien and encumbrances of the appellant on the Debtors' property, the appellant again specified the jurisdictional questions as to the ownership of the property and as to the farmer status of appellees, which had been decided against it by the Commissioner in its order of May 11, 1943, hereinbefore mentioned, and from which it had not petitioned for a review, and asked the Court to dismiss the proceedings on the same jurisdictional grounds [Tr. pp. 43-52]. In its Memorandum of Decision of date November 14, 1946 [Tr. pp. 58-64] the District Court, through Judge Mathes, declined to allow the appellant to again raise the jurisdictional questions, and in its order of November 14, 1946, affirmed the order of the Commissioner, determining the lien and encumbrances of the appellant [Tr. p. 65].

Appellees' Statement of Facts.

Appellees, at this time, respectfully request leave of the Court to present, in an appendix attached to their brief, and which will be referred to under the abbreviated designation "app." an exhibit and certain portions of other exhibits, and certain testimony which they deem essential to a full and proper understanding of the appeal, and all of which has a direct bearing upon arguments and representations of the appellant in appellant's opening brief: and appellees represent that the necessity for presenting the same in printed form was not anticipated at the time of the printing of the transcript of the record herein.

Because of the appellant's incomplete and, in some instances, erroneous statement of facts, which appellees are unable to accept, appellees ask the indulgence of the Court in submitting their own recital of the facts, even though it may be, in some respects, repetitious of the appellant's statement.

The facts are fully and correctly set forth in the Findings of Fact of the Conciliation Commissioner upon the "Petition for Determination of Amount of Existing Lien and Encumbrance" of date August 1, 1944 [Tr. pp. 20-34], and in the Memorandum of Decision of District Judge William C. Mathes, of date November 14, 1946 [Tr. pp. 58-64]. The basic facts, so far as they are set forth in the opinion of the California District Court of Appeal, dated July 28, 1942, in *Hall v. Citizens National Trust & Savings Bank of Los Angeles, et al.*, 53 C. A. (2d) 625, hereinafter mentioned at different times are, as regards the same proof in the Farmer-Debtor proceedings, in accord with those established in the later proceedings.

In 1927, the appellees owned certain ranch property in Leona Valley in Los Angeles County, consisting of approximately 3,000 acres. During that year, the appellees organized Farm Home Builders, Incorporated, a corporation, which they wholly owned and controlled, and to which they transferred the title without consideration, other than an agreed concurrent issuance of stock in said corporation which failed, due to a revocation of the permit for the issuance of the stock. On December 12, 1932, Farm Home Builders executed a re-assignment of all its right, title and interest in the said real property and in Declaration of Trust 5873, hereinafter mentioned, to the appellees. The Citizens National Trust & Savings Bank, as Trustee, never accepted or agreed to said re-assignment [Tr. p. 92].

On July 30, 1927, acting through their corporation, appellees borrowed \$45,000.00 from Pan American Bank of California, the indebtedness being evidenced by a five-year promissory note which provided for "interest until paid, at the rate of seven (7%) percent per annum, payable quarterly in advance," and which also contained this provision—"should interest not be so paid, it shall become a part of the principal and thereafter bear like interest" [Petitioner's Exhibit No. 6, a photostatic copy, Tr. pp. 239-244]. This note was secured by a deed of trust, of which Title Insurance and Trust Co. was Trustee, and Pan American Bank, beneficiary. The payment of the note was guaranteed by Phillips and Hambaugh Realty & Construction Company, selling agents, and by the appellees. At the same time, a declaration of trust, to enable the subdivision of the said property and the payment of said note through the sale and release of portions of said property, was entered into between said Farm Home

Builders and said Pan American Bank, in which the said bank acted both as trustee and payee-beneficiary,

Pan American Bank went into liquidation proceedings on July 29, 1929, and the Superintendent of Banks took over the assets and control of the said bank for the purpose of liquidating the same. Thereafter, the Pan American Bank, being in liquidation and thereby incapacitated from continuing to act as trustee of the Declaration of Trust heretofore mentioned, the said original Declaration of Trust was superseded by a new Declaration of Trust, the same being numbered 5873, in which Citizens National Trust & Savings Bank of Los Angeles was named as Trustee, Farm Home Builders as Trustor, and/or beneficiary, Pan American Bank as "First Payee" and Phillips and Hambaugh Realty & Construction Co., selling agents, "Second Payee" [Tr. pp. 275-299], and the purpose of Trust 5873 was to carry on the subdivision and sale of the said property, and to accomplish the objects outlined in the original Declaration of Trust, of which Pan American Bank was both Trustee and payee-beneficiary. Phillips and Hambaugh were subsequently paid in full as "Second Payee," and have no present interest under Declaration of Trust 5873.

On January 7, 1930, the Superintendent of Banks, on behalf of Pan American Bank, executed a grant deed to Citizens National Trust & Savings Bank of Los Angeles, of all its title to the property covered by the Declaration of Trust.

On October 30, 1935, for the purpose of making it possible for Farm Home Builders to sell the individual parcels of real property and thereby ensure the payment of the unpaid obligation to said Pan American Bank, said Declaration of Trust 5873 was amended to reduce the

release prices. This amendment was signed by Farm Home Builders, but not by appellees [Tr. pp. 176-178].

On February 9, 1939, the Declaration of Trust was again amended to further reduce the release prices. It was signed by Farm Home Builders by appellee F. D. Hall, as president, also by the appellees individually, though the appellees were not named as parties to the agreement [Tr. pp. 182-185].

The corporate powers of Farm Home Builders were suspended June 26, 1930, and were not revived until November 22, 1940. The re-assignment from Farm Home Builders to appellees, hereinbefore mentioned, and the two amendments of October 28, 1935 and February 9, 1939 of the Declaration of Trust 5873, all occurred during the period of the suspension of the corporate powers of Farm Home Builders.

On November 2, 1939, in the proceedings in the liquidation of Pan American Bank, the Superintendent of Banks assigned the beneficial interest of Pan American Bank in Trust 5873, to appellant in settlement of a claim of petitioner against Pan American Bank. On November 13, 1939, appellant notified Citizens Bank not to permit sales under the Declaration of Trust (pursuant to the modified release provisions), without appellant's approval, and thereafter, appellant and Citizens Bank refused to approve any sales. On June 4, 1940, appellant directed Citizens Bank to declare all obligations under the Declaration of Trust due and proceed to a trustee's sale. Notice of sale was given on July 3, 1940, and the sale was noticed for November 13, 1940 [Tr. pp. 219-238].

On November 4, 1940, appellees and Farm Home Builders, as plaintiffs, instituted an action in the Superior

Court of Los Angeles County against Citizens Bank, Title Insurance & Trust Co., appellant and others to restrain and enjoin the threatened sale, for a reformation of the Declaration of Trust, for declaratory relief as to the rights of the parties, and for an accounting to determine the amount of the obligation [Tr. pp. 112-138]. Injunctive relief was sought on the theory that the transfer to the appellant, of the note and security, was beyond the jurisdiction of the Court which had approved the sale, and, therefore void, and that the appellant had accordingly received no title to the note and security, and that the effect of the modification agreements had been to extend the maturity of the note, and that the defendants, by their conduct, were estopped from foreclosing and selling, and that the Court should fix a reasonable time for the making of sales by appellees, under the modified release agreement of February 9, 1939. The trial court concluded that appellant had no title to the note and security; also that the defendants were estopped from selling the property, and granted limited and permanent injunctions. The Court declined to make any findings as to the amount due for principal, interest or taxes. (53 C. A. (2d) 629.)

The defendants (including appellant) appealed, and the District Court of Appeal, First District, Division 2, reversed the trial court, but in its opinion, ruled that Farm Home Builders held title to the property as a constructive trustee for the appellees. However, it also ruled that the transfer of the note and security to appellant was valid and not beyond the power of the Court.

Upon the question of "estoppel," the Appellate Court, page 637 of its opinion, said in part, as follows:

"In support of the findings that appellants are estopped to assert default for periods of twelve months

and eighteen months, respondents rely upon the amendments of the Declaration of Trust and the notice of November 13, 1939 from Pacific States to Citizens Bank, not to permit sales without the approval of the former. Respondents refer to other 'numerous and varied acts of the parties,' but except for the amendments and notice just referred to, these acts did not amount to more than a mere forbearance. The amendments merely reduced the release prices of the various parcels of the property; it may be that by executing the instruments, the parties waived past defaults, but they cannot, under the guise of an estoppel, be construed to be an extension of the maturity of the note. * * *

The Supreme Court of California denied a hearing. Shortly after the remittitur had come down, appellees instituted the pending Farmer-Debtor proceedings in the United States District Court, thus superseding the jurisdiction of the State Court. Consequently, there has never been any retrial of the matter in the State Court.

The Commissioner, in his Findings of Fact [Tr. pp. 27-28], found that statements of account had been annually, or more frequently, rendered by Citizens Bank to the interested parties during the years 1933 to 1940 inclusive, and accepted as correct, in which no interest had been added to principal and in each of which statements, Citizens Bank stated without reservation, the unpaid balance of the obligation as of beginning and ending of the accounting period. The Commissioner also found that it was the intention of the Superintendent of Banks, as liquidator of Pan American Bank, to waive interest, and that such interest actually was waived and that the Super-

intendent of Banks would, at all times during which it was liquidator, as aforesaid, have accepted payment of the principal balance, without interest.

[Excerpts from statements App. pp. 1-9; Letter of date March 19, 1936; Debtor's 2-7 App. p. 10; Testimony F. D. Hall, App. pp. 11-16; O. E. Horstman, App. pp. 17-23; C. M. MacFarlane, App. pp. 23-31; A. Q. Robison, App p. 32.] ·

The Commissioner further found that the said note, by its terms, fell due on July 30, 1932, and that the same was not renewed, extended or revived, and that the note outlawed July 30th, 1936 [Tr. p. 29].

The Commissioner concluded that the note required the compounding of interest at the rate of 7% per annum, payable quarterly to maturity, and to require the payment of simple interest at the rate of seven (7%) per cent per annum for four years from the maturity, and that interest beyond that period was waived by the Special Deputy Superintendent of Banks in charge of the liquidation of Pan American Bank, and that to do equity it was the conclusion of the Court that in addition to the payment of the unpaid principal, interest, as aforementioned, should be added [Tr. pp. 34-37].

Honorable Wm. C. Mathes, in his written Memorandum of Decision [Tr. pp. 58-64], reviewed the contentions of the petitioner (appellant) and found them to be without merit, and his concluding paragraph was as follows:

“The Commissioner's order is not to be disturbed unless there has been a clear abuse of discretion. I find that the Commissioner acted well within the bounds of his discretion. Therefore, the order of August 1, 1944, will be affirmed” [Tr. p. 64].

During the administration of the estate herein, on July 3, 1943, pursuant to Court order, certain sales of portions of the real property were authorized and consummated, aggregating approximately \$49,878.45, which sum less amounts paid to reimburse Citizens Bank for advances to pay taxes, etc. [Tr. pp. 40-41] is being held by the Trustee, subject to Court order. The Commissioner, in his order of August 1, 1944 [Tr. pp. 39-42] directed that the obligation to appellant be paid and satisfied from said fund. The said obligation has not been paid, the appellant having refused to accept the determination of the Commissioner and Honorable Wm. C. Mathes as to the amount of its lien.

Under the heading "Statement of Facts" on page 4 of appellant's opening brief, the following comment relating to the interest of Farm Home Builders under Trust 5873 is made:

"The only interest of Farm Home Builders thereunder is to receive any sum remaining in the hands of the trustee after first deducting the amounts necessary for the payment of all items shown in the trust."

It has been adjudicated that appellees are the owners of the property, subject only to the liens of the trust deed and Declaration of Trust 5873. Upon satisfaction of the debt and payment of the trustee's fees, appellees will be entitled to the surrender of the note and to a reconveyance from the trustee of the trust deed, and being the only parties left in interest, will also be entitled to demand and receive from Citizens Bank, a reconveyance under Trust 5873, and an assignment of remaining outstanding contracts of sale and to receive any balance of cash on hand in the trust.

The unpaid principal, at the commencement of these proceedings, was \$23,921.52, and the interest which was computed and allowed by the Commissioner aggregated \$9,912.71, making a total sum payable to Pacific States Corporation of \$33,834.23 [Tr. pp. 39-40].

Counsel for appellees will comment at a later and more appropriate time on some of the arguments contained in appellant's Statement of Facts.

Legal Questions Involved.

Based upon the facts as found by the Commissioner upon ample evidence, and affirmed upon review by the District Court, appellees contend that the order determining the lien and encumbrance and the order affirming the same, are proper and correct.

Appellees specifically maintain:

First: That there was a waiver of interest as found by the Commissioner, and the only reason that the Commissioner awarded any interest was because he deemed it equitable to do so.

Second: That without a waiver, simple interest, and not compound, would have been payable after the maturity of the note on July 30, 1932.

Third: There was no extension of the maturity date of the note.

Fourth: That the note was outlawed as of July 30, 1936, and that the same was not revived, (a) by the complaint in *Hall v. Citizens Bank, et al.*, in the

Superior Court, nor (b) by payments applied to principal or interest, nor (c) by the so-called Amendment to Declaration of Trust of date February 9, 1939, nor (d) by any letters written by appellee, Frank D. Hall.

Fifth: That had the debt been revived, it still would not have altered the legal effect of the waiver.

Sixth: That appellant was not a holder in due course, and took the note subject to any infirmities.

Seventh: That the decision of the District Court of Appeal is not *res judicata* as regards the waiver of interest, nor as regards the amount of the debt, nor as regards the application of the Statute of Limitations.

Eighth: That the same equitable right to redeem applies in case of a trust deed, as in the case of a mortgage, whether the debt be outlawed or not.

Ninth: That the jurisdictional questions as to appellees' rights to maintain the Farmer-Debtor proceedings were *res adjudicata* and the District Court properly denied the appellant's petition to dismiss.

Presentation of Argument.

We believe that it will aid the Court if we present our points in the order which follows, rather than by adopting the order of appellant's opening brief. In the argument which hereafter follows, the points raised by appellant will be discussed under the appropriate topical heading. All underscoring, italics and other marks of emphasis are ours, unless otherwise indicated.

ARGUMENT OF THE LAW.

I.

There Was a Waiver of Interest, as Found by the Commissioner, and the Only Reason That the Commissioner Awarded Any Interest Was Because He Deemed It Equitable to Do so.

In this connection, the Commissioner found the following facts [Tr. pp. 27-29]:

“V. Citizens National Trust and Savings Bank of Los Angeles has acted in its capacity of trustee under the terms of its said declaration of trust No. 5873 since the trust’s inception in December, 1929, and up to the present time. It has from time to time entered into contracts of sale as parcels were sold, has collected the installments of the purchase prices as paid, and has executed conveyances as the purchase prices were paid in full; it has applied collections in payment of agents’ and beneficiaries’ commissions and operating expenses and in payment of principal, and up to January 30, 1932 of interest, on the promissory note obligation, and in the payment of trustee’s fees, title and other charges, and has in general performed its duties under the said trust since it accepted the responsibility of trustee.

“During the years 1933 and 1934 it prepared and rendered semi-annual accounts, and in the years 1935, 1936, 1937, 1938, 1939 and 1940, annual accounts of its collections, disbursement and distributions for the respective periods covered by the accounts; each of said accounts set forth a statement of the unpaid balance of the promissory note obligation at the beginning and ending of the accounting period. For the years 1933, 1934, 1935, 1936, 1937 and 1938 the said accounts were furnished to and received by the

Special Deputy Superintendent of Bank of the State of California in charge of liquidation of said Pan-American Bank of California and were at the same time furnished to and received by the debtor, Frank D. Hall. Said accounts were accepted and acted upon by the said debtor and by the said liquidator as true and correct statements of account. For the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account.

“None of the said accounts, except the one for 1940, showed the application of any sum to the payment of interest on the said obligation. The acceptance of said accounts indicated an intention on the part of the liquidator of said Pan-American Bank of California to waive interest; and said interest was actually waived by the owner and holder of said promissory note in conjunction with the obligors thereunder. The Citizens National Trust and Savings Bank of Los Angeles, as trustee of Trust No. 5873, and the said liquidator of Pan-American Bank of California, would, at all times during which said liquidator was the owner and holder of said promissory note, have accepted payment of the balance shown in the current account in full satisfaction of the said note, and which facts were known to the Pacific States Corporation at the time of the transfer of the note from the said liquidator to the said creditor.

“All interest which fell due on the said note was paid until January 30, 1932, the interest for the quarter ending on said date being paid on March 29, 1932. After the last mentioned date no payments were applied by the trustee to interest, except as shown in the 1940 account, where an application is

made by the trustee of one-half of \$727.70 to principal, and the other one-half to interest, said sum of \$727.70 having been paid by the debtor, Frank D. Hall, to the said liquidator of Pan-American Bank of California, on August 23, 1927, and not having been previously shown on any accounts of the trustee.

“The said note by its terms fell due on July 30, 1932, and the same was not renewed, extended or revived.

“The statutory period for the commencement of an action at law to collect the said promissory note expired July 30, 1936, and at the time the said application was made in the year 1940, of \$363.85, towards the payment of interest, the said note was long past due and the obligation outlawed.

“At no time prior to 1942 was any statement prepared or furnished where interest was added to principal to establish a new principal for the calculation of subsequent future interest. In the year 1942, the Citizens National Trust and Savings Bank of Los Angeles, as trustee, at the instigation and by the direction of Pacific States Corporation, prepared a statement in which an attempt was made to re-compute the unpaid obligation represented by the said promissory note and wherein estimated interest was added to principal each quarter from the date of the note to indicate a new principal for the computation of the next quarter's interest, and thereby in effect to compound interest from the date of the note until the date of the statement. The debtors upon receipt of the said re-computation promptly rejected it and challenged the right of the trustee and of Pacific States Corporation to re-compute the obligation.

“VI. In accordance with the accounts prepared and furnished by the Citizens National Trust and

Savings Bank of Los Angeles as trustee under Trust No. 5873, and accepted as correct by the parties in interest at all times prior to the time that Pacific States Corporation acquired the said obligation, and also accepted by the latter corporation as to the accounts, as prepared and furnished in 1939 and 1940, the unpaid balances of the obligation at the respective dates hereinafter mentioned, were as follows:

“On 1-30-32 (the date to which interest was last paid)	\$35,600.96
On 4-30-32	34,977.60
On 7-30-32 (the date the note fell due)	34,075.29
On 7-30-36 (the date the note outlawed)	29,355.95
On 12-31-40 (the date of the last unchal- lenged account)	23,921.52”

As conclusions of law, applicable to this question, the Commissioner found [Tr. pp. 36 and 37]:

“IV. By their conduct Citizens National Trust and Savings Bank of Los Angeles, as trustee of Trust No. 5873, and the liquidator of Pan-American Bank of California, were and are estopped to claim that interest should be allowed beyond a period terminating four years from the maturity of the note, and this estoppel applies to Pacific States Corporation, the successor in interest of Pan-American Bank of California in liquidation.

“V. Since the debtors are in effect asking this Court to determine the amount of the lien on their property in order that they may redeem their property from such lien, it follows, in accordance with the equitable doctrines applicable thereto, that the debtors must do equity, even though the obligation to pay the note in question is barred by the Statute of Limitations, and it is the conclusion of this Court that the obligation to pay the note is barred.

“To do equity in this case, it is the determination of this Court, that the debtors should pay, and the Pacific States Corporation receive, in addition to the unpaid principal of the promissory note, interest at the rate and for the period as provided in Conclusion I. Further, it is the conclusion of this Court that it would be inequitable under the circumstances of this case for the debtors to be compelled to pay interest on the unpaid balance of the note beyond four years from the maturity of the note. In addition, there should be paid all other sums, the payment of which this Court has found to be secured by the lien of the deed of trust and/or by the lien of the said declaration of trust.”

The District Judge, in his Memorandum of Decision upon the review proceedings [Tr. pp. 62-63], commented as follows:

“The Commissioner found that Citizens Bank in its capacity as trustee prepared and rendered accounts of all collections, disbursements and distributions during the years 1933-1940 inclusive, and that each account set forth a statement of the unpaid balance of the promissory note obligation; that these accounts did not set forth any charge for or payment of interest; that the accounts were furnished to debtors and to State officials in charge of liquidation of the Pan American Bank and were accepted by them as true and correct; that acceptance of the accounts evidenced an intention on the part of the liquidator of Pan American Bank to waive interest and interest was so waived. As conclusions of law from these findings of fact, the Commissioner held that Citizens Bank, as trustee, and the liquidator of the Pan American Bank were estopped to claim interest after July 30, 1936 and that this estoppel applied to petitioner.

“There is ample evidence to sustain the Commissioner’s findings, and there is no error in the conclusions of law drawn therefrom.”

The statements of account are Debtors’ Exhibit No. 2-4, already referred to. [See excerpts App. pp. 1-9 and excerpt from 1940 Statement, Tr. p. 305].

In addition, on March 19, 1936, Clock, McWhinney & Clock wrote a demand to F. D. Hall (one of appellees), on behalf of the Superintendent of Banks, demanding the payment of the balance of the indebtedness in the sum of \$29,356.11, and threatening proceedings if said sum were not paid [Debtors’ Exhibit 2-7, App. p. 10]. The statement rendered as of December 31, 1935, showed a balance of \$29,355.95 (App. p. 5).

In October, 1942, nearly three years after Pacific States had acquired the note, by direction of Pacific States, the obligation was recomputed, and interest compounded quarterly in advance, to set up a purported unpaid balance as of October 30, 1942, of \$55,479.75 instead of \$23,921.52, as shown in the statement of 1940 prepared by the Citizens Bank and accepted at that time by Pacific States [Recomputation—Pacific States Exhibit No. 2AA, Tr. pp. 251-266]. Prior to the purported recomputation, no interest except the \$363.85 in the 1940 statement had been added.

The attitude of the State Banking Department, as gleaned from and justified by the testimony, is that it was well aware that this note would be difficult to collect because of the deleterious effect of the world depression upon the real estate market, and that it realized that the best results would be obtained from keeping Frank D. Hall, the owner, on the job of selling the ranch off in parcels,

under the subdivision plan. It knew that Hall was better acquainted with the property than anyone else, and had demonstrated his ability to sell in the past. In keeping Hall on the job, and it did so from 1929 to 1939, the Banking Department felt it was serving the best interests of the defunct bank. To enable him to make sales, when to do so was impossible with the release prices as originally fixed, it agreed to a modification of the prices in 1935, and again in 1939. In addition, not only was the State Banking Department satisfied to waive the interest, which is indicated by its acceptance of the Trustee's annual statements and by its one demand made on Mr. Hall, but it was also willing to make a substantial discount in the unpaid principal, as is shown by Hall's testimony.

This was the situation when Pacific States entered the picture and took over in November, 1939. The complexion was immediately changed. Mr. Hall was forthwith forbidden to make sales at the release prices set forth in the agreement of February 9, 1939. Sales that he was prepared to consummate were refused by Pacific States. A default was declared of the obligation, and a demand for immediate payment made. Mr. Hall was unable to comply and sale proceedings were instituted under the power of sale contained in Declaration of Trust No. 5873. It was apparent that Pacific States coveted this unfortunate man's land, and that it was going to get it, whether or no. The litigation in the State courts prevented the trustee's sale in the first instance, and the institution of the Farmer-Debtor proceedings has stalled any further efforts of Pacific States to become the owner by forced sale.

Between 1932 and 1940, there had been no mention of interest, and not until two years later was there any intimation of compound interest. Then, at the instigation of Pacific States, a recomputation of the indebtedness was made to include the compounding of interest quarterly in advance, to arrive at a staggering total of approximately 2.25 times the legitimate and admitted indebtedness. [Pacific States Exhibits No. 2AA; Tr. pp. 251-266.] Needless to say, the exorbitant demand of Pacific States was promptly refused. The Farmer-Debtor proceedings were then instituted.

That the Banking Department's judgment of Mr. Hall's ability as a salesman, and reliance upon his industry and perseverance, was justified, was subsequently demonstrated when, after the inception of the Farmer-Debtor proceedings he, through his own unaided efforts, and an increase in the demand for real estate having arisen, was able to consummate, with the approval of the District Court, sales aggregating approximately \$50,000.00, which sum, less sums already mentioned, is held by the trustee subject to Court order [Tr. p. 30].

For the Court's further enlightenment upon the waiver phase, we ask the Court's indulgence to review briefly some of the oral testimony in the case.

Frank D. Hall testified that from February 9, 1939 to February, 1941, he was trying to sell the land; that he had an agreement with the Bank Commissioner to reduce the price and that he had agreed to do everything he could to get money in [Tr. p. 82]; that the Bank Commissioner "was asking me to hurry up and get all the sales I could in there so we could reduce this total, that he could give me good co-operation at all times, and tried

in every way to o.k. all my sales, and got all the help to me that he could so I could make sales and decrease the total amount due" [Tr. p. 82].

"The Commissioner: You were trying to sell it to pay off the indebtedness? Is that it?

The Witness: Yes, sir, at all times" [Tr. p. 83].

Mr. Hall further testified that during 1939 "I kept advertising and calling on prospects, and spent all my available time that I could possibly put in, running back and forth after people trying to work up business" [Tr. p. 88]. Also, that since 1937, he had spent the larger part of his time endeavoring to work up prospective sales [Tr. p. 90].

From the Transcript, page 97, the following testimony of Mr. Hall is quoted:

"Q. (By Mr. North) What did you do trying to get the obligation paid up? A. I tried a great many ways to get you paid up, Mr. North.

Q. I asked you, Mr. Hall, what you did in trying to get the obligation paid up? A. I tried to make sales, tried to borrow money."

And from App. p. 11:

"Q. (By Mr. Von Herzen) That's the portion that you expected to sell the properties, and expected it to bring enough money to pay this indebtedness? A. In 1939, I tried to sell the larger pieces. After talking to Mr. McFaul, and making some arrangements with him, I tried to sell everything I could get people to take hold of, and pay it out.

Q. What do you mean by talking to Mr. McFaul? A. Mr. McFaul was banking commissioner. He told me if I could get \$15,000.00 together, he would recommend giving me a complete receipt, for the whole thing, so I tried to make every sale possible."

At this time, the unpaid balance, as shown by the 1938 statement was \$25,549.45.

And from App. pp. 12-14:

"Q. At or about the year 1939, was there anything transpired between you and Mr. McFaul, that indicated to you that you had to do something to pay off this indebtedness at once? A. (After objection overruled) I went up and had numerous conversations with Mr. McFaul, off and on, and sometime, I would say about the middle of 1939, thereabouts, I had a talk with him. He said, 'We are anxious to get this cleaned up. If I could, I would almost give it to you. I want to get it out of here.' I said 'I will see what I can do. I am pretty sure I can borrow some money.' I had a chance before to borrow some. I went up and told him I could borrow \$18,000.00. At that time, he did not want to accept it. He said, 'If you can get \$15,000.00, I will try to put the thing through for you, and get it cleaned up,' and he said, 'Let's do it before the first of the year.'"

Q. Subsequently, the obligation was transferred by Mr. McFaul to the present holder? A. About the first of November, I thought I would go up and have a further talk with Mr. McFaul, and see what he was planning, and I got up to his office and found Mr. Robison with him.

Q. Do you mean Mr. Robison here in Court? A. Yes."

It was then stipulated that Mr. Robison was originally with the Pan-American Bank; that he was later connected with the office of the Superintendent of Banks and participated in the liquidation of Pan-American Bank until September 1, 1935, and subsequently became identified with the Pacific States.

O. E. Horstmann, called as a witness on behalf of Pacific States, testified that he was an employee of Citizens Bank, and had supervision of Trust 5873, and that the unpaid principal on the note was \$23,921.52 (App. p. 17); that the bank had no records which showed the "unpaid balance" shown in the last column of Exhibit 2-AA (the 1942 recomputation from compounding the interest) (App. pp. 19-20); that he had nothing to do with the preparation of that statement, and that the items therein were not reflected in any permanent record of Citizens Bank (App. p. 21); that if Mr. Hall or Mrs. Hall had come to the bank and asked to see the unpaid balance of principal, they would have been shown ledger sheets similar to Exhibit No. 2-10 (which showed no interest added after 1932) (App. pp. 21-22).

C. M. MacFarlane, a witness on behalf of Pacific States, testified that he was assistant trust officer of Citizens Bank, and had had supervision of all accounting in the trust department since 1928 (App. pp. 23, 25). In answer to questions by the Commissioner, he identified a ledger sheet of the bank relating to the \$45,000.00 note involved in these proceedings, and showing a purported balance unpaid thereon of \$23,921.52, the ledger sheet then being admitted in evidence as Debtors' Exhibit 2-10 (App. pp. 23, 24). The witness also testified that this ledger sheet was a continuation sheet, and that the open-

ing entry of \$29,990.49 was the balance of the mortgage on February 18, 1935 (App. p. 26); that the various statements of Trust 5873, represented by Debtors' Exhibit 2-4, were made under his general supervision; that he did not know why interest was not included (App. p. 27); that the one entry of interest \$363.85 on the sheet from January 1, 1940, to December 31, 1940, was not part of the account, because the money had never passed through the bank's hands (App. p. 25). Referring to the statement for the period from January 1, 1933 to June 9, 1933 (one of ten comprising Debtors' Exhibit 2-4) and which discloses the unpaid principal as of December 31, 32, as the sum of \$33,557.65, the witness was interrogated at length by the Commissioner. The interrogation concluded as follows (App. p. 29):

"The Commissioner: So that I may understand you, again referring to this figure of \$33,557.65—

A. That is a statement of the obligation of Trust 5873.

The Commissioner: To whom?

A. To the Pan-American Bank. An obligation is not set up on the Trustee's books—it is set up when it appears as an asset of another trust. An asset of that trust, trust 5902. The whole of the corpus of trust 5902 consisted of that note, and that is put on merely as a Memorandum entry.

The Commissioner: It is the entire corpus of 5902?

A. Yes.

The Commissioner: So that this balance of \$33,557.65 was the unpaid balance of the note which constituted the corpus of 5902?

A. Yes."

Upon the established facts, the Commissioner found that the interest had been waived and the District Court affirmed his finding.

We now proceed to a discussion of the law of waiver, in so far as it is applicable to this proceeding.

The law relative to waiver is well stated in 27 R. C. L. and 25 Cal. Jur.

From 25 Cal. Jur., subject "Waiver," pages 926 to 929, we quote the following:

"§2. Definitions and Distinctions.—A waiver is the intentional relinquishment of a known right, with knowledge of the facts. While the terms 'waiver' and 'estoppel' (in pais) are sometimes employed indiscriminately, strictly speaking, the former is used to designate the act or the consequence of the act of *one person only*, while the latter is applicable where one's conduct has induced another to take such a position that he will be injured if the first be permitted to repudiate his acts."

"§3. Requisites.—Subject to the rule that there may be a waiver or relinquishment of a claim to something without right, or an unenforceable claim, it is a general doctrine that to constitute a waiver, there must be an existing right, benefit or advantage, a knowledge actual or constructive of its existence; and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It has been held that there must be a meeting of minds and an intentional forbearance to enforce a right. Waiver is a voluntary act and implies an abandonment of a right which can be enforced, or of a privilege which can be exercised—an election to dispense with something of value or to forego

some advantage which one might, at his option, have demanded or insisted upon. It necessarily, therefore, assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right * * *

“§4. Rights and privileges subject to waiver.—A person may waive any civil right and the benefit of any statute or code provision in respect of his rights and obligations, unless such waiver would be against public policy. Indeed, it is one of the maxims of jurisprudence that ‘anyone may waive the advantage of a law intended solely for his benefit’ * * *”,

and from 27 R. C. L., subject “Waiver,” pages 906 and 908:

“§3.—Rights and privileges subject to waiver.—The doctrine of waiver, from its nature is applicable, generally speaking, to all rights or privileges to which a person is legally entitled, whether secured by contract, conferred by statute or guaranteed by the constitution, provided such rights or privileges rest in the individual, and are intended for his sole benefit * * *

and

“§5.—Requisites.—To constitute a waiver within the definitions already given, it is essential that there be an existing right, benefit or advantage, a knowledge, actual or constructive of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless such waiver is distinctly made with a full knowledge of the rights which he intends to waive; and the fact that he knows his rights and intends to waive them, must plainly appear.”

A waiver always rests on intent.

Killian v. Conselho Supremo, etc., 31 C. A. (2d) 497;

Cohen v. Metropolitan Life Ins. Co., 32 C. A. (2d) 337.

Accepting payment of the whole principal as such, waives all claim to interest.

§3290 Civil Code.

In a case of this kind, the waiver rests on Statute, rather than on the intent, as in other cases.

That interest may be waived, see:

Estate of Hein, 32 C. A. (2d) 438, 443,

from which the following quotation is taken:

“It was held in *Jones v. Maria* (48 Cal. App. 171) that a person who is in a position to assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such rights. Once such right is waived, it is gone forever. The person who has waived the right will thereafter be precluded from asserting it.”

That parties may waive the provisions of the Civil Code—

§3268 Civil Code.

Waiver is a question of fact. See

25 Cal. Jur., subject, “Waiver,” p. 932,

where the following text appears:

“§8.—Province of Court and Jury.—Whether there has been a waiver is usually regarded as a question of fact to be determined by the jury. While some authorities say that waiver is a mixed question of law and fact, each case depending upon its own peculiar circumstances, the only question of law that can be involved relates to the legal definition of the word. For example, a jury may be properly instructed as a matter of law, that a waiver must be voluntary and that it implies a knowledge of the right, claim or thing waived. And yet, whether the waiver was voluntary and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury, except when but one inference can be drawn from the facts.”

In the following more recent cases, it was held that “Waiver is a question of fact” to be considered under all the evidence.

Lyons v. Brunswick-Balke Collender Co. (1942),
20 C. (2d) 579; 127 P. (2d) 924;

Schick v. Equitable Life Assur. Soc. (1936), 15
C. A. (2d) 28;

Boyd v. A. E. J. Chivers Co. (1933), 134 C. A.
566, 569.

The Commissioner’s finding that there was a waiver of interest is well supported by the testimony, by the circumstances and by the conduct of the parties. There is no merit in appellant’s criticisms.

II.

Even Had There Been No Waiver, Simple Interest and Not Compound Would Have Been Payable After the Maturity of the Note on July 30, 1932.

The note involved in this case was for \$45,000.00; was dated July 30, 1927, and was payable on or before five years after date and provided for "interest until paid at the rate of seven (7%) per cent per annum, payable quarterly in advance." It also contained this provision—"Should interest not be so paid, it shall become part of the principal and thereafter bear like interest."

It will be noted that *there is no express provision to pay interest after maturity, and no express provision that interest shall become part of the principal after maturity and thereafter bear like interest.*

Certainly the compounding of interest, unless where it is expressly and undeniably agreed to, is not favored.

The following quotations from 30 Am. Jur., subject, "Interest", p. 45, are apropos:

"Section 55.—Generally—The rule generally recognized is that interest should not bear interest. From an early day, the Courts both in England and in this country have been opposed to the allowance of compound interest, and the enforcement of its payment has been refused on the ground of public policy. In the language of Chancellor Kent, 'Interest on interest promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculations and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to inflame the avarice and harden the heart of the creditor.' But this principle admits of certain

exceptions and modifications, even where ordinary obligations to pay money are involved. Thus, as a general rule, detachable interest coupons bear interest from the date of their maturity, and interest on judgments and decrees in themselves include principal and interest theretofore accrued. The general rule as ad-
 duced from authorities, is to the effect that compound interest is not recoverable, unless there has been a settlement between the parties, or a judgment where the aggregate amount of principal and interest is turned into a new principal, or where there is a special agreement to do so, in such a form to be valid."

In 47 C. J. S. "Interest", Section 3(b), p. 15, it is stated:

"The law does not favor compound interest, or interest on interest, and the general rule, subject to some exceptions, is that in the absence of contract or statute authorizing it, compound interest is not allowed to be computed on a debt."

In *Robertson v. Dodson*, 54 C. A. (2d) 661, 665, the Court said:

"(5) Moreover, the compounding of interest has never been looked upon with favor in this State. (*Doe v. Vallejo*, 29 C. 385; *Yndart v. Den*, 116 C. 533 [48 Pac. 618, 58 Am. St. Rep. 200]; *Schneider v. Turner*, 10 C. (2d) 771 [76 P. 2d 668].)

"It should also be noted that the legislature has expressly provided that 'in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest, *unless an agreement to that effect is clearly expressed in writing* and signed by the party to be charged therewith'. (Emphasis ours.) *Deering's Gen. Laws* (1937), Act 3757, #2; Stats. 1919, p. LXXXIII.)"

Robertson v. Dodson, *supra*, is followed and quoted from in *State of California v. Day*, 76 C. A. (2d) 536, 554.

It is not denied that in some States, it has been held that the words "until paid" mean until actually paid, whether before or after maturity. In Canada and England, and in several States, including California, it has been interpreted to mean "until maturity."

Perhaps the leading case upon the subject is that of *Puppo v. Larosa*, 194 C. 717. There the note provided "*at the rate of no interest until paid.*"

The Court said (p. 720):

"The promissory note by its terms, bore no interest. The trial court allowed legal interest thereon from the date of maturity. * * * When money is not paid according to the terms of a note, the holder suffers a detriment properly compensable in damages, which Courts have generally adjudged to be the rate of interest agreed upon in the note, if it be within the legal rate (Sec. 3289 C. C.), between maturity and the date of judgment. The fact that the contract provides for no interest has nothing to do with the damages due after the breach of the condition for payment on the due date of the note. Too much importance should not be given to the words 'at the rate of no interest' contained in the note. They import no more than that the defendant agreed to pay the plaintiff, on the maturity of the note, the principal sum of \$3,875.00. Some confusion has arisen in this connection because the damages have usually been reckoned in terms of interest; *but interest after maturity* is not according to contract, but by way of damages, and is recoverable as a matter of law when ascertainable. Therefore, the Court has power to determine the damages, which it generally does by allowing legal interest after maturity and up to the

time of judgment. In such cases there seems to be no good reason under our practice, why judgment may not be given for interest from the maturity or in damages, either mode being proper. * * * The principal amount of the note here sued on 'became due' thirty days after its date. It should bear interest from that date notwithstanding the agreement of the parties that it should not bear interest before it matured. * * *."

Followed in *Nesbit v. McDonald*, 203 C. 219.

Also:

Irvine v. Reclamation District, 24 C. (2d) 468, and other cases.

In the *Puppo* case, counsel for defendant argued earnestly in his briefs that the words "until paid" meant until the time of payment of the principal whether before or after maturity.

In *United States National Bank v. Waddingham*, 7 Cal. App. 172, where a printed promissory note payable three months after date had the words written therein "without interest until paid" and the note contained the following printed words at the end, "Should not this note be paid at maturity, it shall thereafter bear interest at the rate of two per cent per month", the Court construed the inserted language "without interest until paid" to mean "without interest until maturity."

An examination of cases cited in appellant's opening brief under appellant's point 1A discloses that invariably where the interest was compounded after maturity, the note expressly provided for the compounding of interest after maturity. In this case, as heretofore stated and as now repeated for further emphasis, *there was no express provision for the compounding of interest after maturity.*

It is also, we contend, the law of this State and of other states, that where a Statute such as Section 3289 of the Civil Code of California, provides that “* * * any legal *rate* of interest stipulated by a contract remains chargeable, after a breach thereof as before until the contract is superseded by a verdict, or other new obligation”, the word “rate” means the specific percentage specified without reference to the manner of computation.

There is ancient and respected authority in this State for our contention.

In *Raun v. Reynolds*, 11 C. 14, 19, the Supreme Court, in the year 1858, said:

“According to the common acceptation, the expression ‘rate of interest’ has reference to the percentage or amount of interest, and not to the manner of computing. Rate is defined by Webster to be ‘the price or amount stated or fixed on anything.’ That it was used in this sense by the Legislature is, we think, evident from the fact that it was thought necessary that direct authority for the compounding of interest by contract should be given in a separate Section of the Act.”

Our contention is further borne out by the language of Section 1916 Civil Code, where it is provided,

“When a *rate of interest* is prescribed by law or contract, without specifying the period of time for which such rate is to be calculated, it is to be deemed an annual *rate*.”

Clearly the *rate of interest* which the note under consideration bears is 7% per annum, and under Section 3289 Civil Code, it would continue to bear that rate after maturity, and in the absence of an express provision for compounding of interest after maturity, simple interest only would be payable.

III.

There Was No Extension of the Maturity Date of the Note.

In support of this proposition, reference is made to 8 Am. Jur., subject "Bills and Notes", p. 32,

"#289.—Contract of Extension.—An agreement to extend the time for payment of a negotiable instrument must possess all the elements essential to the execution of a contract. *It must be supported by a good and sufficient consideration and it must be for a definite time and bind the payee to forbear suit and debar the obligor of the right to stop interest by paying the debt during the time of extension.*

"The extension agreement must mutually bind both parties. If the obligor has the right to pay the debt at any time, this mutuality is destroyed and the agreement is not valid * * *." (Citing, Annotation 85 A. L. R. 330.)

Upon this subject, and to the same effect, see 19 Cal. Jur., subject, "Negotiable Instruments", Section 86, page 902.

See also, *Wilmans v. Weissman*, 38 C. A. (2d) 693, where it was held that to support a contract to refrain from commencing proceedings on a note after maturity, a new consideration was necessary.

As already mentioned, the District Court of Appeal, in *Hall v. Citizens National Bank*, 53 C. A. (2d) 629, 637, commented:

"* * *; It may be that by executing the instruments, the parties waived past defaults, but *they cannot, under the guise of an estoppel, be construed to be an extension of the maturity of the note.*"

It cannot, therefore, be claimed that there was any valid extension of the maturity of the note under discussion.

IV.

The Note Was Outlawed as of July 30, 1936.

The Commissioner so held and the District Judge affirmed [Tr. pp. 29, 63].

The note, dated July 30, 1927, was payable on or before five years from date and thus matured on July 30, 1932. It became barred in four years under Section 337 of the Civil Code. The maturity date was not extended, and the note was not renewed, as shown in our Point III. That the note was not revived will be discussed in subdivisions of this our Point IV.

That Statutes of Limitation are now looked upon with favor, is well recognized and is borne out by the following quotation taken from 16 Cal. Jur., subject, "Limitation of Actions", pp. 394, 395, viz:

"§5.—Judicial attitude toward Statute. At an early period, after the passage of the English Statute of Limitations, the impression prevailed that limitations were not to be favored, the statute being regarded as a technical means of avoiding a just debt. But now, statutes of limitations are viewed favorably as affording repose and security from stale demands to one who may have lost the ability to procure evidence. As has been said, they are vital to the welfare of society. They have become rules of property. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. A plea of the statute is no longer considered as a technical objection, but as a plea on the merits. The defense of the Statute of Limitations is regarded as a meritorious defense, within the meaning of Section 473 of the Code of Civil Procedure; and a Court may in its discretion permit a pleading to be amended in order to

set up the defense. The statute, when pleaded, will be enforced in all cases which come within its operation, and Courts do not invoke strained constructions to relieve a party from its operation.”

Citing:

Lilly Brackett Co. v. Sonneman, 157 C. 192;
San Diego Realty Co. v. McGinn, 7 C. A. 264;
Fontana Land Co. v. Laughlin, 199 C. 625;
D. A. Foley & Co. v. State, 119 C. A. 300.

The attitude of the State of California is further disclosed by the fact that it does not allow claims against the estates of deceased persons, which claims are barred by the Statute of Limitations.

Section 708 of the Probate Code reads:

“No claim which is barred by the Statute of Limitations shall be allowed or approved by the executor or administrator or by the judge.”

And too, that barred claims are not favored in bankruptcy, is supported by the following references:

The statute does not require the scheduling of outlawed obligations.

Remington Sec. 574.

The Statute of Limitations may be interposed against the allowance of a claim. The bar of the statute must be pleaded and proved, else it is “waived” and the referee may not of his own motion disallow a claim as barred.

Remington Sec. 958.

It is the Trustee's duty to interpose the bar of the Statute of Limitations.

Remington Sec. 959.

Any creditor may also plead the bar.

Remington Sec. 960.

That scheduling does not revive outlawed debts.

Remington Sec. 962.

In re Wederfield, 277 F. 59, 47 A. B. R. 365, it was said that:

"The scheduling of a debt barred by the statute does not make it a provable (allowable) claim."

IV (a).

The Debt Was Not Revived by Reason of the Allegations of the Complaint in Hall v. Citizens Bank, et al.

It is argued by counsel in appellant's opening brief, that by virtue of certain allegations in the complaint in the said Superior Court action, which was verified by Frank D. Hall, as an individual plaintiff, that the debt was revived as against Farm Home Builders, the maker of the note. It is our position that it is immaterial who verified the complaint, because under California decisions, the acknowledgment provided for in section 360 C. C. P., must be made direct to the creditor or to someone authorized to contract for him, and that a pleading in a court proceeding is addressed to the Court and not to the creditor.

See:

16 Cal. Jur., subject, "Limitation of Actions",
pages 594, 595, Section 191;

Roper v. Smith, 45 C. A. 302;

Biddell v. Brizzolara, 64 C. 354;

Vischer v. Wilbur, 5 C. A. 562;

Estate of Azevedo, 17 C. A. (2d) 710, 712.

In the latter case, it was held that the listing by the administrator in the assets of the estate of an outlawed debt which he owed the deceased, did not revive the debt because it was not made to a party authorized to contract on behalf of the estate.

Appellant's point is without merit.

IV (b).

A Payment Alone Does Not Revive a Debt Under Section 360, C. C. P.

Aside from the question of whether the payments collected by the Trustee from the sale of lots, and not directly from the maker of the note, constitute an acknowledgment of the debt, and we are inclined to believe that they do not, there is certainly no new promise to be implied from them, upon which a revival of the debt can be predicated. Furthermore, a part payment by itself does not take the case out of the operation of the Statute of Limitations.

See 16 Cal. Jur., subject, "Limitations of Actions", page 580, from which we now quote:

"§176.—Part payment.—Although there are a number of decisions which contain language indicating that an acknowledgment may be made by part

payment of principal or interest alone, or that a part payment accompanied by a letter which contains no reference to the debt is sufficient to take a case out of the operation of the Statute of Limitations, it has been pointed out that in the context in each case there was a writing which contained an acknowledgment sufficient to comply with the Statute. It seems to be settled, therefore, that part payment is insufficient for this purpose, unless it is accompanied by a letter or writing which contains a reference to the debt, and which either of itself, or with the aid of permissible evidence of extrinsic facts, amounts to an admission of an existing debt which the debtor is liable for and willing to pay. For example, a check sent in payment of a debt does not meet the requirements of the Statute even though there is a memorandum written on the check-stub in possession of the sender stating its purpose; but if there is a writing accompanying the check, which contains a promise, either expressed or implied, to pay the debt, it is sufficient even though it is necessary to introduce parol evidence to explain the writing."

Citing:

Clumin v. First Fed. Trust Co., 189 C. 248.

In the recent case of *Wilson v. Walters*, 66 C. A. (2d) 1 (1944), the Court said on page 2:

"(1) During the five-year period, the defendant made a series of \$25.00 payments on account, commencing September 1937, and ending in March 1939, amounting to a total payment of \$450.00 on a judgment for \$8,858.75. This fact standing alone would not toll the Statute. (*Purdy v. Maree*, 31 C. A. (2d) 125 [87 P. (2d) 390].)"

IV (c).

The Amendment to the Declaration of Trust, of Date February 9, 1939, Did Not Revive the Debt.

Opposing counsel, in their opening brief, say again and again that the so-called amendment to Declaration of Trust No. 5873, of date February 9, 1939 [Tr. pp. 182-185], was a sufficient acknowledgment or promise to revive the debt, in conformity with Section 360 C. C. P. This agreement was between Citizens Bank, as Trustee, Farm Home Builders, as Trustor, and/or beneficiary and Pan American Bank in process of liquidation, by John McFaul, Special Deputy Superintendent of Banks, in charge of liquidation. The agreement was not signed on the part of Citizens National. It was signed for Farm Home Builders, Inc., by F. D. Hall, president, but without the corporate seal, and it was signed by John McFaul, as Special Deputy Superintendent of Banks, on behalf of said Pan American Bank in liquidation. In addition, it was signed by the Halls, who were not parties to the amendment, and not parties to Declaration of Trust No. 5873. The signature of the Halls was meaningless and the effect was nothing more than an acknowledgment by them that they knew of the amendment. As to the Farm Home Builders, there being no signature by the secretary and no seal, there is no presumption that the execution of the document was authorized by the directors, and there certainly is no presumption that the president alone could bind the corporation by his signature. We merely wish to say that the contract is vulnerable for these and other reasons.

But aside from the weaknesses mentioned, there is the question of the legal right or power of Farm Home Builders to enter into the contract. The corporation's corpo-

rate powers had been suspended since 1930, and they were not revived until 1940. In 1939, therefore, it was forbidden, under severe penalty, to transact business. (Political Code 3669(c) as then in effect and General Laws, Act 8488—Section 32, as then in effect.) In 1929, the Bank and Franchise Corporation Tax Act (said Act 8488), which had previously provided that every contract made in violation of the Act should be void, had been amended to provide that every such contract should be voidable, and this was the Statute in 1939. Therefore, the amendment to the Declaration of Trust, even assuming that its execution by Farm Home Builders was authorized, was voidable as regards the said corporation. This Statute as to the voidable provision was passed upon judicially in 1936 in *Depner v. Joseph Zukin Blouses*, 13 C. A. (2d) 124, 127, and a petition for hearing was denied by the Supreme Court. In the Appellate Court decision, the opinion on page 127 reads, in part, as follows:

“(2) A voidable act takes its full and proper legal effect unless and until it is disputed and set aside by some legal tribunal entitled so to do. (Bouvier’s Law Dictionary, 3406.) ‘Voidable’ means subject to be avoided by judicial action of a court of adequate jurisdiction. (8 Words and Phrases 7342.) And a voidable contract is one which is void as to the wrongdoer, but not void as to the wronged party unless he elect to so treat it. (*Inlow v. Christy*, 187 Pa. 186 (40 Atl. 823).) A voidable contract is one which may be rendered null at the option of one of the parties, and is not void until so rendered. (*Meridian Life Ins. Co. v. Dean*, 182 Ala. 127 [62 So. 90].)”

In the *Hall* case, within ten days after Pacific States had acquired the note and interest of the Pan American Bank, in November, 1939, it repudiated the amendment by declining to recognize or be bound by it. It refused to allow property to be sold at the new release prices set forth in the agreement. It thereby voided the amendment, and that document has no force or legal effect whatsoever and cannot be used as a medium to revive the Statute of Limitations.

IV (d).

The Debt Was Not Revived by Any Letters Written By Appellee, Frank D. Hall, or by His Attorneys.

It is argued by counsel for appellant that the letter of Frank D. Hall to the Citizens Bank of date August 9, 1942, in which he asked for a statement showing the condition of Trust 5873, revived the debt. [Pacific States Exhibit No. 2G; Tr. p. 273]. It will be noted that the letter contains no promise, and makes no admission of indebtedness. Individually, Mr. Hall is not a party to the Declaration of Trust itself, about which he enquires, and he does not purport to write the letter as a representative of the Farm Home Builders. It is apparent that this letter had no bearing on the running of the Statute of Limitations.

As to the letters written by Goudge, Robinson & Hughes, on behalf of Mr. Hall individually, in September and October, 1942, and being part of Pacific States

Exhibit No. 2A [Tr. pp. 242-250], the same reasoning applies and also the additional objection, that they are controversial and make no admissions whatever, the second letter on page 250 of the transcript containing this statement, viz:

“It should, of course, be understood that neither by this letter, or otherwise, have our clients admitted any liability whatsoever; and all negotiations have and will be conducted on that understanding.”

There are possible further objections (1) the extent of the authority of Mr. Hall's attorneys to bind him in a matter outside an action in Court, and (2) the fact that the letters were not written to the creditor which, at the time written, was Pacific States.

The Citizens Bank was not the creditor and was not capable of itself contracting with Farm Builders, or any other person, in reference to the note. It had no power to extend or renew the note or to alter its terms in any way, and under the cases an acknowledgment to it was of no effect as regards the Statute of Limitations.

Thus, in 16 Cal. Jur., subject “Limitation of Actions,” on page 594, the following is stated to be the law, viz.:

“§190.—* * * In determining whether a person is competent to receive an acknowledgment, a test has been formulated, namely, that the person must be capable of contracting with reference to the subject matter as to which the acknowledgment is made.”

Among cases cited:

Visher v. Wilbur, supra;

Roper v. Smith, supra;

In re Azvedo, supra.

V.

**Even Had the Debt Been Revived, the Effect of the
Waiver Would Have Been the Same.**

The law as to the effect of a waiver is tersely stated in 25 Cal. Jur., subject "Waiver," page 930, as follows:

"§5.—Operation and effect.—A *right which is waived is gone forever*, and the person who waived it thereafter precluded from asserting it. * * *."

Citing: *Jones v. Della Maria*, 48 Cal. App. 171, which was followed in *Estate of Hein*, 32 Cal. App. (2d) 438, already cited in this brief, and other cases.

The debt which could be revived would be the debt as waived—or the original debt less payments and portions waived. In the present case, by reason of the waiver, the question of revival of debt is immaterial.

Counsel assert that the California District Court of Appeal, in its opinion in *Hall v. Citizens Bank, supra*, decided that there was interest in default and that this had the effect of a decree by that Court that there was no waiver of interest. This matter will be treated under our Point VII to follow.

VI.

**Appellant Was Not a Holder in Due Course, and Took
the Note Subject to All Infirmities.**

The Commissioner concluded that Pacific States was not a holder in due course (it having acquired the debt after its maturity) [Conclusion III, Tr. p. 35], and the District Court refused to disturb the Commissioner's order.

As to what constitutes a holder in due course, reference is made to 3133 C. C.,—one of the requirements being that the holder must have acquired it before it was overdue.

Section 3139 C. C. provides that

“In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.”

Our Point V was to the effect that there was no extension of the maturity date of the note, or renewal thereof, which date of maturity was July 30, 1932. The note, having matured July 30, 1932, and having been overdue since that time, Pacific States which acquired it long after its maturity, is not a holder in due course, and in its hands, the note is subject to all defenses that could have been urged against Pan American Bank, the original holder, and the State Banking Department, as representing Pan American Bank in liquidation.

VII.

**The Decision of the District Court of Appeals is Not
Res Adjudicata.**

Counsel for appellant contend in their Point III that the judgment in the case of *Hall v. Citizens National Bank*, 53 C. A. (2d) 625, is *res judicata*, that the obligation of appellees was valid and existing under the Declaration of Trust and the deed of trust, on November 4, 1940, and that the appellant had not waived and was not estopped from enforcing the same.

The truth is, that the District Court of Appeal wrote an opinion, and reversed the trial court. This opinion is not, as we understand it, a judgment, but in a second trial would be the law of the case on the same evidence and facts as in the first trial. When the trial court is reversed, as here, the judgment is set aside and there is no judgment until after another trial.

Thus in *Agricultural Pro-rate Commission*, 39 F. Supp. 937, it was held that the parties on a reversal, stand in the same position as if no judgment had been rendered.

And in *Reidy v. Bidwell*, 93 C. A. 202, 269 P. 682, it was held that when the Court, in reversing a case, merely orders "The Judgment is reversed," the effect of such an unqualified reversal is to remand the case for a new trial upon all the issues presented by the pleadings.

To the same effect, see

De Hart v. Allen (1945), 26 C. (2d) 829;

Monson v. Fischer, 219 C. 290;

Central Savings Bank v. Lake, 201 C. 438;

Thomas v. Lavery, 125 C. A. 666,

also 2 Cal. Jur., subject "Appeal and Error," page 996, where the following language is used:

"§590. Effect of Reversal. To reverse is to overthrow, set aside, make void, annul, repeal, revoke or vacate. When a judgment or order is reversed, it is entirely reversed, and is without validity or force. The proceeding is left where it stood before the judgment or order was made, and the parties stand in the same position as if no such judgment or order had ever been rendered or made."

For this reason, the doctrine of *res adjudicata* has no application in this case.

It is worthy of comment, that in this *Hall* case, the trial court declined to pass upon the questions that were involved in the determination of the lien before the Commissioner, that is to say: (1) the amount of the debt; (2) whether the note provided for interest after maturity; (3) whether interest had been waived, and (4) whether the debt was outlawed, and it therefore follows that there has been no previous judgment on those matters, either by a trial courtt or by an appellate court.

VIII.

The Same Equitable Right to Redeem Applies in Case of a Trust Deed, as in the Case of a Mortgage, Whether the Debt Be Outlawed or Not.

The equitable doctrine, that he who seeks equity must do equity, is applicable to mortgagors and to trustors under trust deeds who seek to redeem.

As to the general doctrine, see

10 Cal. Jur., subject "Equity," Section 50, pp. 508-511.

As to its application to mortgagors, see

10 Cal. Jur., subject "Equity," Section 52, pp. 512-513,

from which we quote:

"Pursuant to the maxim that he who seeks equity must do equity, it is settled in California, that a mortgagor cannot quiet his title against the mortgagee, without paying the debt secured though it is barred by limitations. * * * So the fact that the debt is barred by limitations does not absolve a mortgagor from payment when he wishes to redeem his property."

See numerous cases cited, including:

Shimpones v. Stickney, 219 C. 637.

That the doctrine is as applicable to the trustor under a trust deed as to a mortgagor under a mortgage, see:

Meets v. Mohr, 141 C. 667;

Toule v. Santa Cruz County Title Co., 20 C. A. (2d) 495;

Dool v. First National Bank, 207 C. 347.

Notwithstanding Section 2911 of the Civil Code that a lien is extinguished with the debt which it secures, a pledgor or mortgagor cannot recover his property without paying his debt. This is clearly established in *Puck-habor v. Henry*, 152 C. 419, which is also a leading case upon the conditions in California which a mortgagor or trustor must comply with in order to redeem or quiet title.

As to redemption from lien—how made.

Sec. 2905 Civil Code provides:

“Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay.”

See, also, 18 Cal. Jur., subject “Mortgages,” Section 513, pages 225-226.

As to “Definition, Nature and Effect” of Trust Deeds, see 25 Cal. Jur., subject “Trust Deeds,” Section 3, page 9, where it is said:

“* * * . Such a deed is distinct from a mortgage—though, as has been observed, in some cases, it is difficult in principle to distinguish them. But, like a mortgage, a trust deed is a mere security, its primary purpose being to secure the payment of a debt, or the performance of some act. Accordingly, a trust deed has been said to be practically, though not in legal effect, little more than a mortgage with power to sell and convey * * *.”

In *Boyce v. Fisk*, 110 C. 107, which was an action to quiet title, as against a mortgage, the Court said (p. 113):

“The fact that his debt is barred by the Statute of Limitations does not absolve the mortgagor, who would redeem the property, from paying the debt. The moral obligation remains and rests upon the mortgagor, who would redeem to pay, as a condition thereof, the sum of money which the mortgagee could have recovered but for the bar of the Statute.”

In that case, the unfortunate mortgagor had contracted to pay *4% per month, compounded monthly after maturity* until paid. The Court compounded the interest for four years, or until the outlaw date, and then added straight simple legal interest for the time that the debt had been debarred. In other words, this was what the Court deemed equitable in *Boyce v. Fisk*. The Conciliation Commissioner in view of the waiver in the present case, allowed compound interest to date of maturity—then simple interest at 7%, which was the rate provided in the note, until the date of outlaw, and no interest (or damages) from that date. This was the conclusion of the Conciliation Commissioner as to what was equitable under the circumstances. The amount allowed in view of the waiver and other facts, was eminently fair to Pacific States Corporation.

We do not question the authorities, such as *Bank of Italy National Trust & Savings Bank v. Bentley*, 217 C. 644, and others cited by opposition counsel, that the right of a trustee to sell under the sale powers contained in a trust deed is not subject to any Statute of Limitations, even though the debt will become barred in four years,

and even though the right to foreclose a trust deed in a court action may also be barred. We deny that the fact that the time of sale may be delayed extends the maturity of the note. We say that the beneficiary, after the debt is outlawed, is not entitled to damages for the outlaw period, other than such as may be assessed by the Court.

That an action to redeem the property from a trust deed will lie, we refer to 25 Cal. Jur., subject "Trust Deeds," page 65, and quote as follows:

"§50. Actions to Determine Claim to Reconveyance and to Redeem. Under section 1050 of the Code of Civil Procedure, authorizing one to bring an action against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation, the beneficiary in a trust deed may maintain an action to have the validity of his security determined where the debtor claims a right to a reconveyance without the payment of any sum, or upon payment of less than the amount actually secured.

Action to redeem.—It has been observed that an action for an accounting of proceedings under a declaration of trust and for a reconveyance on payment of the amount found due is in substance and effect an action to redeem the property from the liens secured by the deed of trust. In such action the proper decree is that the debtor within a fixed time pay the amount found due and that the trustee, upon receipt or tender to him of such amount, make, execute and deliver a good and sufficient deed of conveyance of the title held by him in trust of the premises, and, on failure to pay or tender such sums within the time prescribed, that the debtor be barred of all further right or claim to redeem."

IX.

That the Jurisdictional Questions as to Appellees' Rights to Maintain the Farmer-Debtor Proceedings Were Res Adjudicata and the District Court Properly Denied the Appellant's Petition to Dismiss.

Appellant's point V (Op. Br. p. 50) apparently is that since title to the real property in question had been transferred to a corporation wholly owned by appellees, appellees were technically not the owners of the land and hence did not have sufficient interest therein to commence the proceedings under section 75.

However, contrary to the assertions in the brief that, "This issue was first placed before the Court on the petition for review from the order of the Conciliation Commissioner of August 1, 1944" (Br. p. 55), the matter was considered by the Conciliation Commissioner on two different occasions *prior* to the order from which the present appeal has been taken, and it was also considered by the District Court in a proceeding from which no appeal was taken.

On January 14, 1943, Pacific States Corporation filed a "Petition for Dismissal" of the proceedings [Tr. p. 308]. The first ground was that neither of the present appellees were farmers within the intendment of the statute, and the second ground was that "neither Frank D. Hall nor Marguerite S. Hall, is the owner of any of the property particularly described in Schedule BI of the original petition filed herein . . ." On May 11, 1943, the Commissioner denied said petition in its entirety, stating, *inter*

alia, “that he found said debtors, Frank D. Hall and Marguerite S. Hall, to be farmers within the meaning of subsection ‘r’ of section 75 of the Bankruptcy Act, *and also to be the owners of the real property* described in the schedules attached to their petition . . .” [Tr. p. 309, emphasis added.] No review was taken from this order, and it became final [See Tr. p. 316].

The same matter was again urged upon the Commissioner in a “Petition for Dismissal” filed September 14, 1943, by the trustee under the deed of trust [Tr. p. 311]. Among the allegations of the petition, the following appears: “That neither of the above named debtors is the owner of any of the property hereinabove referred to, or any part or portion thereof, and any interest which they or either of them may have in said trust consists only of a right to receive proceeds therefrom if the terms and conditions of said trust have been performed and complied with, and neither of said debtors has any present interest in the said property.” This petition was accompanied by a “Notice of Motion to Strike from Petition and Schedules” containing the statement that, “said motion to be based upon the ground that neither of said debtors is a farmer and upon the further ground that said debtors, or either of them, do not own said real property or any part or portion thereof.” The order dismissing the petition and denying a motion to strike recites that not only the moving trustee appeared, but also that the “creditor, Pacific States Corporation” appeared by its counsel [Tr. p. 318]. A petition for review of this order was heard by the Honorable J. F. T. O’Connor, District Judge, and said order was affirmed on August 29, 1944 [Tr. p. 324]. No appeal was taken from said order of the District Court, and it is now

final. The appeal presently before the Court is from an order of the District Court entered November 14, 1946, which was made upon review of an order of the Commissioner dated August 1, 1944, upon a "Petition for Determination of Amount of Existing Lien and Encumbrance" and "Petition for Order to Apply Moneys to Payment of Debt" [Tr. pp. 39, 65].

Appellant apparently concedes that the question whether or not the debtors are farmers is not now open to review as such issue was "previously before the court" (Br. p. 55). He appears to have overlooked the fact that the question he now attempts to raise was also before the Court and passed upon at the same time as the issue relating to whether or not the debtors were farmers.

Regardless of whether he concedes it or not, it is respectfully submitted that the issue which appellant now attempts to raise under this point has been previously decided in this case and the time for review and appeal having passed, is now *res judicata*. *Stoll v. Gottlieb*, 305 U. S. 165, 170-172, 83 Law Ed. 104, 107, 108; *Henderson v. Denious*, 186 Fed. 100; *Stearns Salt & Lumber Co. v. Hammond*, 217 Fed. 559; *Lewith v. Irving Trust Co.*, 67 F. (2d) 855; *In re Sterling* (9 Circ.), 125 F. (2d) 104. Perhaps appellant may argue that the question raised is jurisdictional and may be urged at any time. Such an argument is and would not be valid. The issue sought to be resurrected was specifically urged upon the Commissioner on two occasions, appellant being present

in each instance, and was urged upon the District Court one one occasion prior to the ruling from which the present appeal has been taken. There would be no end to litigation if disappointed parties could raise the same question any number of times and still be entitled to be heard thereon. In the case of *In re Sterling, supra*, this Court speaking through Circuit Judge Mathews, said:

“The question of the Court’s jurisdiction to grant the injunction was raised by Bolsa Chica at the first hearing before the referee and was determined adversely to Bolsa Chica’s contention by the referee’s order of May 15, 1940. No review of the referee’s order was sought or obtained. The time within which such review might have been sought expired long before the contempt certificate was filed. As to Bolsa Chica, therefore, the referee’s order was and is conclusive; for *the principles of res judicata apply as well to jurisdictional questions as to other questions*, as well to bankruptcy cases as to other cases, and as well to decisions of referees as to those of judges.” (Emphasis added, citations omitted.)

To the same effect:

Arizona Power Corporation v. Smith (9 Circ.),
119 F. (2d) 888.

Although we believe the ^{appellant} contention here made has no substance as far as its merits are concerned, it does not, in view of the foregoing, appear to be necessary to discuss it further.

Sundry Other Matters.

Appellant's Point II (Op. Br. p. 28) is that Equity requires the payment to the appellant of interest from and after the filing of the petition. This is an astonishing suggestion, considering the facts.

The Commissioner has found that interest was waived and that the debt was barred as of July 30, 1936. The Commissioner determined the amount of the debt secured by the lien of the trust deed, and ordered it paid from the moneys received from certain sales authorized by the District Court. The Commissioner also decreed that the note be cancelled, and that the trust deed and Declaration of Trust be likewise cancelled, and that all be delivered to the Court, and that the trustees execute full reconveyances in favor of the debtors [Order dated August 1, 1944, Tr. pp. 41-2].

The payment of the amount set by the Commissioner was refused by Pacific States which petitioned for a Review in the District Court, and then took this appeal.

The sales money, approximately \$50,000.00 less certain sums disbursed therefrom as provides in the Commissioner's order and hereinbefore mentioned, has remained in the joint custody of the Commissioner and the Citizens Bank (Trustee). Of that deposit, \$33,834.23 belongs to Pacific States, upon its compliance with the Commissioner's Order, and Pacific States alone is responsible for the non-delivery of said money.

Section 1504 of the Civil Code reads:

“An offer of payment or other performance duly made, though the title of the thing offered be not transferred to the creditor, stops the running of in-

terest on the obligation, and has the same effect on all incidents as a performance thereof.”

This would dispose of any right of Pacific States to claim interest after August 1, 1944, and under the findings of the Commissioner, that interest had been waived and that the debt was outlawed on July 30, 1936, and that Pacific States was not in equity entitled to interest after that date, there would not appear to be any justifiable basis for allowance of the extra “interest” claimed by Pacific States.

Appellant intimates that because appellees offered \$50,000.00 in a composition and extension proposal [Tr. p. 73], which was refused by appellant, and because the debtors’ estate is now worth that sum or more, appellant should be awarded at least that sum. There is no basis in law or the bankruptcy procedure for such claim by appellant.

An offer of compromise which is refused is of no force or effect, and is not even evidence.

Appellant’s counsel state, on page 58 of the opening brief, that appellees have had the free use of \$33,834.23 for more than eleven years. This is not true. The reason appellant has not had the use of said sum since it was determined to be the amount of its claim is because it would not accept same, and clearly, the appellees have had no use of the said \$33,834.23 since it has been impounded with the trustee, nor any use of the excess money in the trustee’s hands, which rightfully belongs to the appellees.

Appellant’s counsel are also in error when they state that the testimony shows that appellees total assets available to satisfy the claim are \$129,878.38 (Opponent’s Br.

pp. 28-29); also in error in the statement on page 29 that the remaining 760 acres are worth \$80,000.00. There is no testimony to sustain these figures.

While the value of the assets may not be material, we would like at least to keep the record straight as to the testimony on this matter.

F. D. Hall testified on February 11, 1943, that the residue of property was worth about \$80,000.00, and Mr. North (appellant's attorney) that appellant believed it to be worth about \$50,000.00 or \$55,000.00 [App. pp. 14-15].

This testimony was given before there were any sales to bring in some \$50,000.00 cash.

On February 11, 1943, Mr. Hall also testified that the original ranch comprised 1,320 acres, which he acquired in 1915, and that within a year after, he purchased 1,560 more acres [App. p. 14].

On February 19, 1943, Mr. Hall testified that he had, at that time, sales which he could make aggregating about \$50,000.00, and that when made, he would have 700 or 750 acres left, and that what was left would have, in his estimation, a value of from \$30,000.00 to \$35,000.00 [App. pp. 15-16]. The testimony is clear and understandable. The estimated gross value, according to Mr. Hall, of his property, was \$80,000.00 to \$85,000.00, before the sales which yielded \$50,000.00, and the appellant, according to its attorney, at that time estimated the gross value to be \$50,000.00 before the sales. It must be remembered also, that at that time Citizens Bank had a prior lien for reimbursement of a sum in excess of \$6500.00, which it had advanced to pay delinquent taxes [Tr. p. 40].

The value of \$129,878.38 set forth in appellant's opening brief is fictitious.

Conclusion.

Appellees maintain that the findings of fact are amply supported by the great weight of the credible evidence; that the conclusions of law are consistent throughout with the findings; that the order determining the lien of the appellant is equitable and fair to appellant, and entirely in accord with the findings of fact and conclusions of law; and appellees maintain that the grounds of appeal of the appellant are wholly lacking in merit.

Wherefore, appellees pray this Court to deny the appeal of the appellant and to affirm the order of the Commissioner and the decree of the District Court affirming that order.

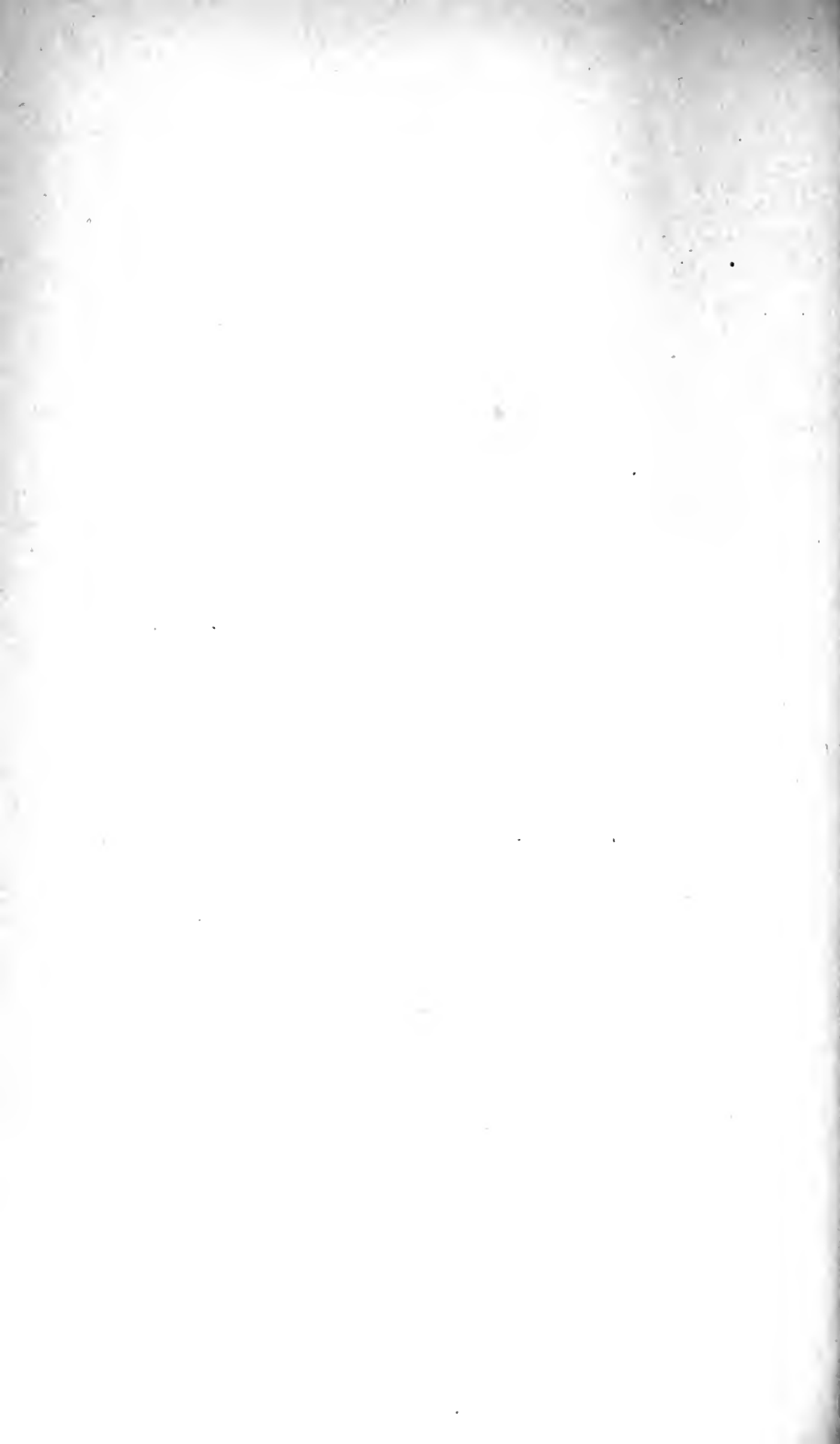
Respectfully submitted,

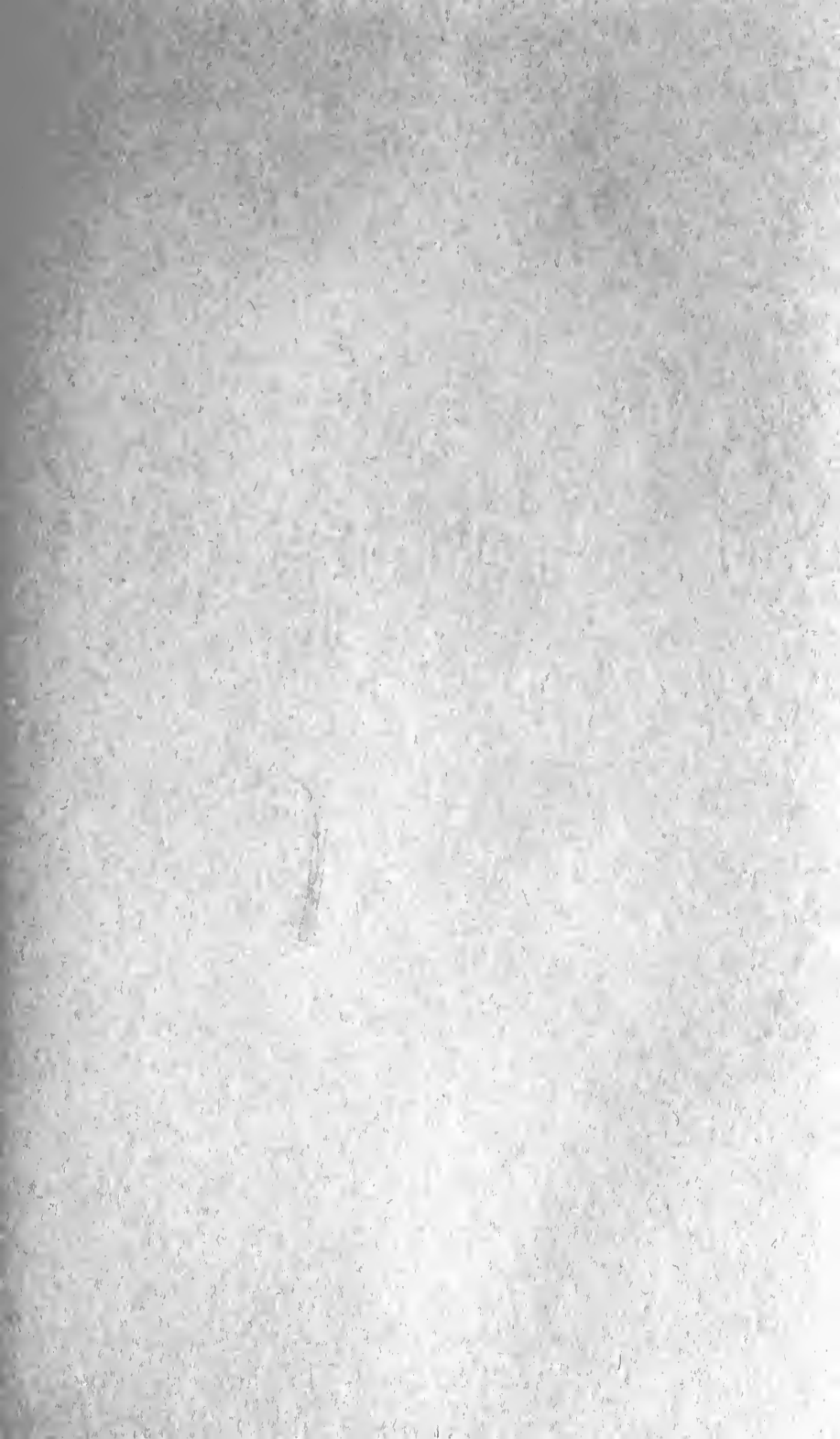
C. P. VON HERZEN,

EDGAR F. HUGHES,

DAVID A. SONDEL,

Attorneys for Appellees.







APPENDIX.

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.		
Trust No. 5873 Trust Account STATEMENT OF		
RELEASE OBLIGATION IN FAVOR OF		
PAN AMERICAN BANK		From 1/1/33 To 5/9/33 Incl.
12/31/32 Unpaid principal balance		33,557.65
33 16 Pain on principal	447.33	
	<hr/>	<hr/>
	447.33	33,557.65
Unpaid balance 5/9/33	33,110.32	
	<hr/>	<hr/>
	33,557.65	33,557.65
	<hr/> <hr/>	<hr/> <hr/>

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.		
Trust No. 5873 Trust Account as indicated		From 9/6/33 To 12/31/33 Incl.
ate		
	Dr.	Cr.
PAN AMERICAN BANK, RELEASE ACCOUNT:		
Balance as per previous statement		432.04
8 Transferred to Pan American Bank,		
Trust 5902, a/c funds available to		
apply on principal of Farm Home		
Builders, Inc. note	432.04	

12/31	Collections applicable for period 9/6/33 to 12/31/33 inclusive: Principal	451.30
		<hr/>
		432.04
	Balance remaining in Account	883.34
		<hr/>
		451.30
		<hr/> <hr/>
		(letter "S" r typewritten)

STATEMENT OF RELEASE OBLIGATION

IN FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance as per previous statement	31,847.50
9/8	On account of principal	432.04
		<hr/>
12/31	Unpaid Balance	\$31,415.46 S
		<hr/> <hr/>
		(letter "S" r typewritten)

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account as indicated From 1/1/34 To 5/31/34 In
Date

	Dr.	Cr.
PAN AMERICAN BANK—RELEASE ACCOUNT:		
Balance as per previous statement		451.30
2/26 Transferred to Pan American Bank, Trust 5902 a/c funds available to ap- ply on principal of Farm Home Build- ers Note	451.30	
5/31 Collections applicable for period 1/1/34 to 5/31/34 inclusive		667.45
	<hr/>	<hr/>
	451.30	1118.75
Balance remaining in Account		667.45
		<hr/> <hr/>
		(letter "S" r typewritten)

STATEMENT OF RELEASE OBLIGATION
FAVOR OF PAN AMERICAN BANK:

Unpaid Balance per previous statement	31,415.46
6/34 On account of principal	451.30
	<hr/>
Unpaid Balance, 5/31/34	30,964.16 S
	<hr/> <hr/>
	(letter "S" not typewritten)

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account as indicated From 6/1/34 To 12/31/34 Incl.
ite

	Dr.	Cr.
PHILLIPS AND HAMBAUGH, AGENTS:		
Balance as per previous statement		770.39
6/31 Collections applicable for period 6/1/34 to 12/31/34 inclusive:		
Interest	1.28	
Principal	34.14	35.42
	<hr/>	
Collection fee for period 6/1/34 to 12/31/34 incl:		
5% on \$285.48	14.27	
3% on 360.10	10.80	25.07
Less 95% chargeable to General Trust Acct.	23.82	1.25
	<hr/>	<hr/>
	1.25	805.81
Balance remaining in Account		804.56 S
		<hr/> <hr/>
		(letter "S" not typewritten)

PAN AMERICAN BANK—RELEASE ACCOUNT:

	Balance as per previous statement	667.45	
6/18	Transferred to Trust 5902, Pan American Bank, a/c funds available to apply on principal of Farm Home Builders note	667.45	
12/31	Collections applicable for period 6/1/34 to 12/31/34 inclusive		306.22
		<hr/> 667.45	<hr/> 973.67
	Balance remaining in Account		306.22
			<hr/> <hr/> (letter "S" in typewritten)

STATEMENT OF RELEASE OBLIGATION

IN FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance, as per previous statement	\$30,964.16	
6/18	On account of principal	667.45	
	Unpaid Balance, 12/31/34	<hr/> \$30,296.71	
			<hr/> <hr/> (letter "S" in typewritten)

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account as indicated From 1/1/35 To 12/31/35 In Date

		Dr.	Cr.
PAN AMERICAN BANK—RELEASE ACCOUNT:			
	Balance as per previous statement		306.22
2/16	To Pan American Bank, Trust 5902, a/c funds available to apply on principal of Farm Home Builders note	306.22	
12/31	Collections applicable for period 1/1/35 to 12/31/35 inclusive:		634.54
		<hr/> 306.22	<hr/> 940.76
	Balance remaining in Account		634.54
			<hr/> <hr/>

STATEMENT OF RELEASE OBLIGATION
 IN FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance, as per previous statement	\$30,296.71	
/18	To Pan American Bank, Trust 5902, to apply on principal	306.22	
		<hr/>	
	Unpaid Balance, Dec. 31, 1935	\$29,990.49	
	(not typewritten).....3/10/36	634.54	(not typewritten)
		<hr/>	
		\$29,355.95	(not typewritten)

PHILLIPS AND HAMBAUGH, AGENTS:

	Balance as per previous statement		804.56
/31	Collections for period 1/1/35 to 12/31/35 inclusive:		
	Interest .12		
	Principal 7.13		7.25
		<hr/>	
	Collection fee for above period:		
	3% on \$616.16 or \$18.48		
	5% on 512.91 or 25.65 44.13		
		<hr/>	
	1129.07 (not typewritten)		
	Less: 99% chargeable to General		
	Trust Acct.	43.69	.44
		<hr/>	
			.44
			811.81
	Balance remaining in Account		<u>811.37</u>

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account as indicated From 1/1/36 To 12/31/36 Incl
Date

	Dr.	Cr.
PAN AMERICAN BANK—RELEASE ACCOUNT:		
Balance as per previous statement		634.54
3/10 To Trust 5902, Pan American Bank, a/c funds available to apply on prin- cipal of Farm Home Builders note	634.54	
12/31 Collections applicable for period of this statement		900.14
	<hr/> 634.54	<hr/> 1534.68
Balance remaining in Account		<u>900.14</u>

STATEMENT OF RELEASE OBLIGATION

IN FAVOR OF PAN AMERICAN BANK:

Unpaid Balance, per previous statement	\$29,990.49	900.14
3/10/36 Paid a/c principal	634.54 (not typewritten)	
Unpaid Balance, Dec. 31, 1936	<hr/> \$29,355.95	

PHILLIPS AND HAMBAUGH, AGENTS:

Balance as per previous statement:		811.37
12/31 Collections applicable to this account for period of this statement:		
Interest	.68	
Principal	.69	
	<hr/>	
Difference	.01	
	<hr/> .01	<hr/> 811.37
Balance remaining in Account		<u>811.36</u>

28,455.81
(not typewritten)

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account GENERAL TRUST From 1/1/37 To 12/31/37 Incl.
(continued)

1937		<u>Disbursements</u>	<u>Receipts</u>
12/31	Collections applicable to this account for period 1/1/37 to 12/31/37 in- clusive:		
	Interest 345.94		
	Principal 124.95		470.89
12/31	Trustee's Minimum annual fee, year 1937	300.00	
		<u>382.84</u>	<u>789.48</u>
	Balance remaining in Account		<u>406.64</u>
PAN AMERICAN BANK—RELEASE ACCOUNT:			
	Cash Balance, 12/31/36		900.14
5/4	To Trust 5902, Pan American Bank: Funds available to apply on principal of Farm Home Builders note	900.14	
12/31	Collections applicable to this account for the period of this statement		952.41
12/31	To Trust 5902, Pan American Bank: Funds available to apply on principal of Farm Home Builders note	952.41	
		<u>1852.55</u>	<u>1852.55</u>
	Balance remaining in Account		<u>—0—</u>

STATEMENT OF RELEASE OBLIGATION

IN FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance, per previous statement	\$29,355.95
5/4/37	Paid a/c principal	900.14
12/31/37	“ “ “	952.41
		<u>1,852.55</u>
	Balance, 12/31/37	\$27,503.40

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account as indicated From 1/1/38 To 12/31/38 Incl.

PAN AMERICAN BANK—RELEASE ACCOUNT:

1938		<u>Disbursements</u>	<u>Receipts</u>
	Cash Balance, 12/31/37		—o—
10/22	To give effect to funds paid to and held by John McFaul, Special Deputy Superintendent of Banks, as per receipt dated 10/14/38	732.00	
10/22	By General Trust Account: transfer of funds per authorization of F. D. Hall, dated 10/18/38		169.34
12/31	By collections applicable to this account period 1/1/38 to 12/31/38 inclusive:		1,784.61
	To Trust 5902, Pan American Bank: funds available to apply on principal of Farm Home Builders note	1,221.95	
		<u>1953.95</u>	<u>1953.95</u>
	Cash Balance, 12/31/38		—o—

STATEMENT OF RELEASE OBLIGATION
IN FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance, 12/31/37	\$27,503.40
12/31/38	Paid A/c principal	1,221.95
10/22/38	Paid a/c principal	732.00*
	Unpaid Balance, 12/31/38	<u>\$25,549.45</u>

*Paid direct to Supt. of Banks,
per advice 10/14/38

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account as indicated From 1-1-39 To 12-31-39 Incl.

PAN AMERICAN BANK—RELEASE ACCOUNT:

1939	<u>Disbursements</u>	<u>Receipts</u>
1-1 Cash Balance per previous statement		—o—
3-20 Transfer to General Trust Account to apply on taxes	\$ 194.38	
3-31 Transfer to General Trust Account re- versing fund transferred to this ac- count 10-22-38	169.34	
Collections applicable to this account for the period 1-1-39 to 12-31-39 incl.		\$1,627.80
	<u>\$ 363.72</u>	<u>\$1,627.80</u>
Cash Balance December 31, 1939	1,264.08	
	<u>\$1,627.80</u>	<u>\$1,627.80</u>

STATEMENT OF RELEASE OBLIGATION

IN FAVOR OF PAN AMERICAN BANK:

(now THE PACIFIC STATES CORPORATION)

Unpaid balance 12-31-38 \$25,549.45

No payments made during above period

DEBTORS' EXHIBIT No. 2-7.

Law Offices
CLOCK, McWHINNEY & CLOCK
1012 Citizens National Bank Bldg.
Los Angeles, California
MUTual 3157
March 19, 1936

File No.

On the subject of this letter address Walter Desmond,
Jr. 1012 Citizens Nat'l Bank Bldg. Los Angeles, Calif.
Mr. F. D. Hall
Leona Valley, via
Palmdale, California

Dear Sir:

We are attorneys for the Superintendent of Banks in charge of the liquidation of the Pan American Bank. Mr. John McFaul, Special Deputy Superintendent of Banks in charge of the Pan American Bank has handed to us your promissory note, dated July 30, 1927 in favor of said Pan American Bank, upon which there is a balance due of \$29,356.11, with instructions to file foreclosure proceedings immediately.

This is to advise you that unless this obligation has been paid within one week from today, foreclosure proceedings will be instituted against you.

Kindly advise us your attitude in this matter.

Yours very truly,

	CLOCK, McWHINNEY & CLOCK
Debtors' 2-7	By Walter Desmond, Jr.
LC	Walter Desmond, Jr.
	Debtors' "A"
	Hearing of Jan. 20, 1943

TESTIMONY OF FRANK D. HALL.

Cross-Examination.

By Mr. Von Herzen, February 11, 1943. [Rep. Tr. p. 293.]

* * * * *

[Rep. Tr. p. 299, line 10, to p. 300, line 14]:

“Q. By Mr. Von Herzen: In other words, if it were necessary to sell, or you were able to sell, any portion of the west to pay this indebtedness, you would have, that is correct, is it not? A. Yes.

Q. The portion that you concentrated on selling was the portion to the east, is that correct? A. Yes.

Q. That's the portion that you expected to sell the properties, and expected it to bring enough money to pay this indebtedness? A. In 1939 I tried to sell the larger pieces. After talking to Mr. McFaul, and making some arrangements with him, I tried to sell everything I could get people to take hold of, and pay it out.

Q. What do you mean by talking to Mr. McFaul? A. Mr. McFaul was banking Commissioner. He told me if I could get \$15,000.00 together he would recommend giving me a complete receipt, for the whole thing, so I tried to make every sale possible.

Mr. North: I object to that as incompetent, irrelevant and immaterial. A. So I thought I could borrow some money. I had some contracts which looked good, and I could get some money from sales, so I tried in 1939 to make some connections—

The Commissioner: Just a minute. You were interrupting the witness, Mr. North?

Mr. North: Yes,

The Commissioner: Do you wish to make a motion to strike the testimony?

Mr. North: No, I am going to leave it alone."

* * * * *

[Rep. Tr. p. 301, line 10, to p. 304, line 3]:

"Q. At or about the year 1939 was there anything transpired between you and Mr. McFaul that indicated to you that you had to do something to pay off this indebtedness at once?

Mr. North: I object to that as immaterial and irrelevant, your Honor.

The Commissioner: I am going to overrule the objection.

A. I went up and had numerous conversations with Mr. McFaul, off and on, and sometime, I would say about the middle of 1939, thereabout, I had a talk with him. He said, 'We are anxious to get this cleaned up. If I could, I would almost give it to you. I want to get it out of here.' I said, 'I will see what I can do. I am pretty sure I can borrow some money.' I had a chance before to borrow some. I went up and told him I could borrow \$18,000.00. At that time he did not want to accept it. He said, 'If you can get \$15,000. I will try to put the thing through for you and get it cleaned up,' and he said 'Let's do it before the first of the year.'

Q. Subsequently the obligation was transferred by McFaul to the present holder? A. About the first of November I thought I would go up and have a further talk with Mr. McFaul, and see what he was planning, and I got up to his office, and found Mr. Robison in with him.

Q. Do you mean Mr. Robison here in court? A. Yes.

Q. Was he with the Bank Commissioner at that time?

A. No, sir.

Q. What concern was he with then? A. So far as I know, he was with this Mr. Merritt. He and Mr. Merritt were up there at the property together.

Mr. North: I object, your Honor, as being irrelevant and immaterial. If Mr. Von Herzen wants to know, wants it in the record, Mr. Robison was originally with the Pan-American Bank, and then he liquidated the Pan-American Bank with the Superintendent of Banks, and then became identified with the Pacific States Corporation. I will so stipulate, if you desire.

Mr. Von Herzen: I understood Mr. Ewing liquidated the Pan-American Bank.

Mr. North: Mr. Robison was assistant to Mr. Ewing at the time.

The Commissioner: You won't accept the stipulation, Mr. Von Herzen?

Mr. Von Herzen: I think with that correction we will. Mr. Ewing was there about eight or nine months. He was assistant to Mr. McFaul, I take it.

Mr. Hughes: Maybe we can agree, Mr. North, to change that a little. Your stipulation implied that Mr. Robison completely liquidated it. My understanding is he had left the employ of the State some time before the liquidation was completed, and Mr. McFaul completed it.

Mr. North: That is correct, Mr. Robison?

Mr. Robison: I left the State Banking Department on September 1, 1935.

Mr. North: The Pan-American Bank was not completely liquidated?

Mr. Robison: All depositors were paid one hundred cents on the dollar when I left.

The Commissioner: You are getting off your stipulation, gentlemen. This is very important.

Mr. North: Mr. Robison was at one time with the Pan-American Bank. In the beginning he was also connected with the Superintendent of Banks' office, and then he later was connected with the Pacific States Corporation, this creditor; I presume that is what you want to bring out. I offer to so stipulate.

Mr. Von Herzen: Without the presumption, I will accept the stipulation.

The Commissioner: Very well."

* * * * *

[Rep. Tr. p. 313, line 25, to p. 314, line 10]:

"Q. That was about 1915? This is all subject to correction, if we do have to correct it. That was when you got the ranch?

Mr. Von Herzen: Half of it, your Honor.

The Commissioner: Half of it. When did you buy the other portion? A. Shortly after.

Q. The same year? A. Well, the same year, or the next year.

Q. We will say then in 1916, you bought 116 acres? A. No, I bought 1560 acres.

Q. What was in the original ranch? A. 1320 acres."

* * * * *

[Rep. Tr. p. 322, line 24, to p. 323, line 5]:

"Q. What do you think the property is worth today? A. About \$80,000.00 now.

Q. Has the bank got any idea on that? A. I have never seen it.

The Commissioner: Has the Pacific States got any idea?

Mr. North: We believe it is worth about \$50,000.00 or \$55,000.00."

* * * * *

[Rep. Tr. p. 323, lines 11 to 23]:

"Q. You say today you think it is worth about \$80,000.00? A. I think so, the way things have been.

Mr. North: There have been about 500 acres sold off, your Honor.

The Commissioner: Are you talking about the balance, the residue? A. Yes.

The Commissioner: When you say \$50,000.00 or \$55,000.00, you are talking about the residue?

Mr. North: Yes, your Honor.

The Commissioner: That is your guess as of today?

Mr. North: Yes."

* * * * *

Direct Examination.

By Mr. Von Herzen, February 19, 1943. [Rep. Tr. p. 406.]

* * * * *

[Rep. Tr. p. 429, lines 5 to 16]:

"Q. Some question may exist, Mr. Hall, with respect to your ability to handle this transaction. Have you got some sales pending, such as the ones, for example, Mr. Munz testified to? A. Yes, sir.

Q. Roughly speaking, what is the total amount of sales that you have available at this time on the ranch, in money? A. \$50,000.00.

Q. Approximately how many acres will you have left after the completion of those sales? A. Well, I would say approximately 700 or 750.”

* * * * *

Re-called for further Examination by the Commissioner. [Rep. Tr. p. 455.]

* * * * *

[Rep. Tr. p. 456, lines 8 to 22]:

“Q. By the Commissioner: Do I understand from you, Mr. Hall, that if these sales went through you would have about 700 or 800 acres left? A. Somewhere between 700 and 800 acres.

Q. And what do you think that land is worth an acre? A. Well, it will vary, every piece pretty nearly.

Q. Of the 700 or 800 you have left, what would that be worth? A. I said I thought \$30,000.00 would be bottom for it. Maybe it is worth more than that. It depends upon how much time and effort is taken to sell it.

Q. In other words, the remaining 700 or 800 acres would be worth about \$30,000.00? A. Yes, I would say from \$30,000.00 to \$35,000.00.”

* * * * *

O. E. Horstmann called as a witness on behalf of Pacific States Corporation, October 4, 1943. [Rep. Tr. p. 517.]

* * * * *

Direct Examination by Mr. North.

[Rep. Tr. p. 517, line 20, to p. 518, line 9]:

“Q. By Mr. North: Mr. Horstmann, you are employed by the Citizens National Trust & Savings Bank of Los Angeles? A. Yes, sir.

Q. I believe you stated here before your position in that bank. Will you please state it and your connection with this Trust 5873? A. Clerk.

Q. In connection with your duties in the Citizens National Trust & Savings Bank of Los Angeles you have supervision or charge of this Trust 5873? A. I do.

Q. Can you tell us how much the principal on that note in that trust is due and is unpaid? A. Yes, sir. Unpaid principal, \$23,921.52.

Q. \$23,921.52? A. That is correct.”

* * * * *

Mr. Sondel on *voir dire*. [Rep. Tr. p. 519, lines 13 to 21]:

“Q. For the purpose of the record, Mr. Horstmann, when did you become employed in the trust department of your bank? A. October 7, 1922.

Mr. Sondel: When was the first time you had participated in the affairs of Trust 5873? A. By that you mean the administration of the trust itself?

Mr. Sondel: That is right. A. The early part of 1942.”

* * * * *

Direct Examination Resumed. [Rep. Tr. p. 569.]

[Rep. Tr. p. 589, lines 8 to 22]:

“Mr. North: Now, if your Honor please, the Court has ringing in your ears the statement that since 1932 the bank has made no statement and made no computation of interest, to the effect that the bank has disregarded entirely all mention of any interest whatever on this debt since 1932. I think it would be remiss on my part if I permitted your Honor to go any further in this hearing without referring to the statement which forms part of Pacific States’ Exhibit 2-A, and in that statement from 1928 to 1938 there are regular statements of interest.

(Discussion.)

Mr. North: I want to ask Mr. Horstmann this question: Was there any enclosure went with the letter to Mr. Hall dated October 8, 1942 and being a part of one of those letters in Pacific States’ Exhibit 2-A?”

* * * * *

[Rep. Tr. p. 590, line 19, to. p. 593, line 2]:

“Mr. Sondel: Yes, we received that copy.

Mr. North: All right. Then that enclosure was received with that letter, and I offer in evidence this enclosure. It is this enclosure that I make reference to in my remarks here.

(Discussion.)

The Commissioner: I am going to overrule the objection, because I would like the document attached to this exhibit which it refers to. It gives me a more intelligent picture of what was done at that time and what the position of the Trustee was at that time.

Mr. Sondel: May I ask the witness some questions in regard to that on *voir dire*?

The Commissioner: I will mark it for identification as 2-AA and attach it to the Exhibit 2-A, for identification. Then after the *voir dire* examination you can make such disposition as you wish with respect to the exhibit.

Q. By Mr. Sondel: Mr. Horstmann, to your knowledge is there any bookkeeping record from which the separate items reflected on this Exhibit 2-AA for identification was copied? A. Certain items were; yes.

Q. My question is, was there a bookkeeping record from which these items were copied? A. I say certain ones were; not all of them.

Q. Do you have any bookkeeping record from which shows that on March 29, 1928 the principal sum was \$45,811.92? A. No; I can't show you that.

Q. Do you have any bookkeeping record which shows the unpaid balance in accordance with any items under the last column of page 1 of this exhibit? A. No, I do not.

Q. Do you have any records of any kind which will show the figures on any line in any part of the last column, designated 'Unpaid Balance,' shown on page 2 of this exhibit? A. No.

Q. Do you have any bookkeeping record of any kind which will show the unpaid balance as reflected on any part of page 3 of the last column? A. No.

Q. Do you have any bookkeeping record of any kind which will reflect any of the items appearing on the last column on page 4, as the unpaid balance? A. No.

Q. Do you have any such records for page 5? A. No.

Q. Do you have any records for page 6? A. No.

Q. Do you have any records for page 7? A. No.

Q. Do you have any records for page 8? A. No.

Q. I will now ask you if you know from your own knowledge on what date, in respect to the transmittal letter, the computations shown on Exhibit 2-AA for identification were made? A. From my own knowledge I do not know the exact date."

* * * * *

[Rep. Tr. p. 596, line 16, to p. 597, line 2]:

"Q. I call your attention, then, on Exhibit 2-AA for identification, you show on October 30, 1939 an indebtedness of \$47,078.32 as the unpaid balance, and on January 30, 1940, \$47,902.19; is that correct? A. That is correct.

Q. I will ask you to show me any bookkeeping records of your bank reflecting these last two payments? A. There are none.

Q. And there never have been any, have there? A. There have not.

Q. And you can't tell us, can you, who prepared that document? A. No."

* * * * *

[Rep. Tr. p. 597, line 21, to p. 600, line 6]:

"Q. By Mr. Sondell: Did you have anything to do with the preparation of that document? A. I did not.

Q. Did you at any time check any of those figures? A. No, I did not.

Q. Did you at any time make any investigation to determine the source of the information from which any of the data included in that document was prepared? A. No.

Q. Did that document ever come into your possession?

A. Copies of it.

Q. And from whom did you receive them? A. From our accounting division.

Q. From whom? A. The exact party I do not know.

Q. And when did you receive them in respect to October 8, 1942? A. Just prior to the date that they were mailed to Mr. Hall, I presume.

Q. How long prior? A. The exact number of days I am not familiar.

Q. Within a month? A. Oh, yes. Within days, I would say.

Q. So that prior to a month you had never heard of the existence of any of that information, had you? A. No.

Q. A month, I am giving you leeway. A. Approximately a month is what you mean.

Q. Approximately a month prior to October 8, 1942? A. Yes.

Q. When that was prepared a copy was given to you and the bank made no effort, to your knowledge, to make any bookkeeping record of that, did it? A. No.

Q. In other words, these items were never reflected in any permanent records of the bank? A. No, they were not.

Q. So that if at any time Mr. Hall or Mrs. Hall, or anybody who had the right to an inspection of your documents, would have come to your bank and asked to see the unpaid balance of principal, you, or whoever had charge

of the books, would show him ledger sheets similar to 2-10? A. Correct.

Q. And the sheet would be the sheet which would show the date applicable; is that correct? A. Correct.

Q. In other words, assuming Mr. Hall came to your bank on March 18, 1938 and wanted to know the unpaid balance, you would have shown him the unpaid balance as reflected in Exhibit 2-10 for that date? A. That is correct.

Q. And that same situation would apply for all periods prior to 1932 and subsequent to 1932, would it not? A. That is correct.

Q. And if Mr. Hall or anyone interested should have come into your bank on January 1, 1936 and said, 'What is the accrued interest owing or unpaid?' was there any record of any kind in the bank which could have been used to convey that information? A. There were not.

Q. And your answer would apply to any other date subsequent to the date of maturity of the note, would it not? A. That is correct."

* * * * *

C. M. MacFarlane, called as a witness on behalf of Pacific States Corporation, being first duly sworn, testified as follows: (October 4, 1943—2:00 P. M.) [Rep. Tr. p. 537.]

* * * * *

Direct Examination.

[Rep. Tr. p. 537, line 10, to p. 541, line 26]:

“Q. By Mr. North: Mr. MacFarlane, you are assistant trust officer of the Citizens National Trust & Savings Bank of Los Angeles? A. Yes.

The Commissioner: Just a minute, Mr. North. Were you going into this document? I merely want this document now introduced by one of you and a proper foundation laid. I want it marked, with the understanding that a photostatic copy is going to be furnished, and I want Mr. MacFarlane to lay a foundation for the introduction of the document.

Mr. North: All right.

The Commissioner: Mr. MacFarlane, we had a ledger sheet here a minute ago from the records of the Citizens Bank. You have it in your hand. It refers to this note of \$45,000.00 principal and it shows a purported balance in the sum of \$23,921.52. Is this the original sheet taken from the records of the bank in this matter? A. Yes, sir.

The Commissioner: I understand you are introducing the document?

Mr. Sondel: That is right.

The Commissioner: Then you have made an objection to it on the ground that no proper foundation has been laid and on the ground that it is incompetent, irrelevant and immaterial; is that correct?

Mr. North: Yes, sir.

The Commissioner: Objection overruled. Will it be satisfactory with you if I put my identification stamp here some place on the document, then we will photostat it and it will take the identification number?

The Witness: Can you put it above the heading?

The Commissioner: Yes, I can.

Mr. North: I also make the objection that the sheet that is offered in evidence is not binding upon the Pacific States Corporation.

The Commissioner: I have already ruled, Mr. North.

Mr. North: I wish to insert that additional objection.

The Commissioner: Very well. I have overruled your objection. This will be Debtor's Exhibit 2-10, but the stipulation is that this document may be withdrawn and a photostatic copy put in its place. I will hand the document back to the witness and turn the examination back to you.

Mr. Von Herzen: Your Honor, I don't have any notation here of this document being prepared under Mr. MacFarlane's supervision and direction. I assume that probably was meant to be included in the fact that he was assistant trust officer and accountant.

The Commissioner: Well, I didn't go very far in laying a foundation. If you think you haven't got enough in the record to establish it, you can ask him.

Mr. Von Herzen: I think I should.

The Commissioner: Very well. Ask whatever questions you want.

Q. By Mr. Von Herzen: Mr. MacFarlane, as assistant trust officer of the bank are you the accountant in charge of this particular trust and the entries made on

this particular sheet? A. I have supervision of all accounting.

Q. And that particular sheet and the entries made thereon were made under your supervision and direction?

A. That is right.

Q. And you are in charge of all the accounts? A. Yes.

Mr. Von Herzen: That is all.

Q. By Mr. North: You have been in that position since 1928, have you? A. Approximately, yes. That is my recollection. It is about that time.

Q. Did the bank, as Trustee of 5873 ever receive any portion of that \$727.70?

Mr. Sondel: I object to that question unless the witness can testify of his own knowledge and not from hearsay or a conclusion. I object to it for the further purpose that the document cannot be impeached in this manner.

Mr. North: If he is competent to testify to the authenticity of the last exhibit he certainly is competent to answer this question.

The Commissioner: I don't think that argument necessarily follows, Mr. North.

"Do you know of your own knowledge that the bank received the item of \$727.70 on or about the date that the entry bears in the ledger sheet? A. The bank did not receive it.

Mr. North: Well, the question that was asked was: Did it receive it on that date? Your answer is, 'No'? A. The answer is, no.

Q. Did they receive that amount or any portion of that amount on any other time? A. No.

Q. Will you tell us, please, the amount of principal and interest that is due upon this note, according to the records of the bank?

Mr. Sondel: I object to that, if your Honor please, as calling for the conclusion of this witness.

The Commissioner: Read the question back, Mr. Reporter.

(Question read by the reporter.)

The Commissioner: Objection sustained. It calls for the conclusion of the witness. What we want to know is not his interpretation of the note. That is the thing that the Court has to decide.

Mr. North: All right. We have stipulated that a certain amount of principal was due on a certain date, that date was June 29, 1940, the principal being \$23,921.52 due on the 29th day of June, 1940.

Q. Tell us whether or not any amount of principal has been paid on this obligation since that time. A. The ledger sheet entry doesn't show any, and of my knowledge I don't know.

The Commissioner: May I ask a question? This exhibit, Debtor's Exhibit 2-10, is that the only ledger sheet upon which the payment of principal and interest are noted in regard to this note? A. No; it is a continuation thereof.

The Commissioner: It is a continuation? A. Yes. Until February 18, 1935, when the balance as showed by the mortgage showed \$29,990.49, at that time our accounting system was changed to a machine system and the balance of \$29,990.49 was used as the opening entry on the new ledger sheet.

The Commissioner: That date was what? A. That was February 18, 1935."

[Rep. Tr. p. 661, line 19, to p. 662, line 9]:

“Q. By Mr. North: Now, Mr. MacFarlane, various statements of this trust 5873 were prepared from time to time and sent to the debtor, and those various statements, or at least many of them, are in evidence here. You are acquainted with those statements? A. They were made under my general supervision.

Mr. North: None of those statements contain items of interest on this note.

Mr. Von Herzen: That is incorrect.

Mr. North: He didn't make them. Strike the last question.

Q. By Mr. North: I hand you Debtor's Exhibit 2-4, containing ten statements, and you will notice that in many of those statements, if not all of them, or many of them at least, there are no designations of interest. A. I am familiar with these statements.

The Commissioner: You say you are familiar with them? A. Yes.”

* * * * *

[Rep. Tr. p. 664, lines 5 to 9]:

“Q. By Mr. North: I have shown you Exhibit 2-4, consisting of various statements of the bank, copies of which were sent to Mr. Hall. Why was reference to interest omitted from those statements between 1932 and 1938? A. I don't know.”

* * * * *

[Rep. Tr. p. 667, lines 3 to 9]:

“The Commissioner: In other words, can you do that; can you tell us why the statements as to interest are not included in these ten documents? A. I had already answered that, had I not, before we adjourned?

The Commissioner: That you couldn't do it? A. That is right."

* * * * *

[Rep. Tr. p. 673, line 13, to p. 675, line 5]:

"The Commissioner: All right. That last part may go out. I will sustain the motion. I am calling your attention, Mr. MacFarlane, to the last page on the statement of January 1, 1933, to June 9, 1933, which discloses the unpaid principal balance, as of 12/31/32, of the sum of \$33,557.65. Is it your interpretation that that is the unpaid principal balance as of that date? A. As far as the statement is concerned, that is a memorandum as to—

The Commissioner: That is not the true figure? A. Yes, it is the true figure, but the memorandum doesn't appear in trust 8573. It is the amount of assets carried in trust 5902. I put on that statement as a memorandum.

Mr. Sondel: I move that that last part be stricken, if the court please, as purely a voluntary statement of this witness, and an attempt to vary the terms of a written instrument, not an explanation or interpretation of the document.

The Commissioner: Overruled. Do you know whether or not this is a copy of the statement sent to Mr. Hall in regard to the operation of this trust 5873? A. It is a statement that should have been sent to him. In other words, it was a statement prepared from the books, and, under my general instructions, that statement should have been sent to Mr. Hall personally. I don't know whether it was sent or not.

The Commissioner: Did you prepare any statement outside of this statement at that time? A. No.

The Commissioner: So that I may understand you, again referring to this figure of \$33,557.65— A. That is a statement of the obligation of trust 5873.

The Commissioner: To whom? A. To the Pan-American bank. An obligation is not set up on the trustee's books—it is set up when it appears as an asset of another trust, as an asset of that trust, trust 5902. The whole of the corpus of trust 5902 consisted of that note, and that is put on merely as a memorandum entry.

The Commissioner: It is the entire corpus of 5902? A. Yes.

The Commissioner: So that this balance of \$33,557.65 was the unpaid balance of the note which constituted the corpus of 5902? A. Yes.”

* * * * *

[Rep. Tr. p. 678, line 5, to p. 681, line 1]:

“The Commissioner: Having examined the statements now in Debtor's Exhibit 2-4, do you find indicated any place on any of the statements a payment on account of interest due on the balance of the principal obligation? A. I understand the question, but there are two that I haven't examined yet.

Mr. Sondel: In order to complete the record, I might hand the witness this other one, for that other period.

The Commissioner: Yes.

A. The answer is no.

Mr. Sondel: Here is one more that isn't in that bunch.

A. The answer is no.

The Commissioner: I will ask the further question, whether any place upon the face of those documents is shown the interest accrued? A. No, sir.

The Commissioner: Very well. Gentlemen, I have finished with my questions.

Q. By Mr. North: Mr. MacFarlane, why do those statements not show the interest accrued?

Mr. Sondel: I was just going to direct the witness' attention to that last statement and give him an opportunity to correct his answer, if he cares to.

The Commissioner: Do you contend that it shows otherwise?

Mr. Sondel: The sheets from January 1, 1940, to December 31, 1940, have one entry of \$363.85.

The Commissioner: I think he should be allowed to correct his answer. Call that to his attention, if you will.

Mr. Sondel: I want to do that, so that Mr. MacFarlane will have an opportunity to correct his answer.

Mr. North: I don't think it will prove to be a correction your Honor, but he has a right to explain it.

The Commissioner: We discussed this item before. I remember this item.

The Witness: That is all right. I saw that. It is not part of the statement. The money never passed through our hands. It is an explanatory entry.

Mr. Sondel: I just wanted to give the witness an opportunity, by calling attention to that item, is all.

The Commissioner: All right. Did you examine it again? A. Yes, sir.

The Commissioner: I understand him and he understands you. Proceed, please. Mr. North, we are back to you now.

Q. By Mr. North: Why do those statements not show interest accrued?

Mr. Sondel: That is objected to as argumentative, and an attempt to explain the terms of an unambiguous written instrument, and it calls for this witness' conclusion.

Mr. North: Your Honor realizes the purpose.

The Commissioner: Just a minute. I haven't asked for any argument on this yet. I think now is the proper time for the court to satisfy its curiosity, so I will overrule the objection and allow the answer to come in, and then I will be very glad to entertain a motion to strike later, if you wish. The objection is overruled. You have the question in mind? A. Yes, sir.

The Commissioner: You may explain it, please.

A. The trust department of the Citizens Bank is maintained strictly on a cash basis. No items of accrual are entered on the records.

The Commissioner: Have you finished the answer? A. Yes, sir.

Mr. Sondel: I now move to strike the answer, if the court please, as being purely a voluntary statement of this witness, a conclusion, and an attempt to impeach a written document by a statement of private practice and custom and procedure of a bank, not communicated to the debtor, and not binding upon him.

The Commissioner: I am going to deny the motion to strike. Maybe Mr. North is going to have to do some arguing after while to explain his position. I am leaving it in because I want to get the information, and the witness is very frank. Now we will have to argue upon the effect of that later on. I do not consider it highly important at this time."

A. Q. Robinson—recalled for further examination, having been previously duly sworn, testified as follows:

[Rep. Tr. p. 621.]

* * * * *

[Rep. Tr. p. 621, lines 11 to 24]:

“Q. By Mr. Sondel: Mr. Robison, after the Pacific States acquired the note in that deal of November 1939 the Pacific States or you received the subsequent copies of the Citizens Bank’s statements, did you not, such as Debtors’ Exhibit G for the period from January 1, 1939 to December 31, 1939 and the one from January 1, 1940 to December 31, 1940? A. Yes; we received that one.

Q. That one; referring to the period from January 1, 1939 to December 31, 1939? A. Yes; we received both of them.

Q. The later one being the one for the period January 1, 1940 to December 31, 1940? A. Yes.”

* * * * *

No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

POINT I.

The Amendment of February 9, 1939, to the Declaration of Trust Is Valid and Enforceable.

For the first time in the seven years of litigation that have marked the attempt of appellant to collect the debt here in issue, counsel for appellees have attempted in their brief to prove that the amendment of February 9, 1939, to the declaration of trust was not a valid contract. (App. Br. pp. 40-42.)

This is exactly contrary to the position taken by appellees during the State court action which preceded the instant proceedings. (See 53 Cal. App. (2d) 625.) In fact, appellees even admit in their brief that in the Superior court action they pleaded and claimed "that the effect of the modification agreements had been to extend

the maturity of the note, . . . and "that the court should fix a reasonable time for the making of sales by appellees under the modified release agreement of February 9, 1939." (A. B.,* p. 7.)

Appellees further admit in their brief that "on February 9, 1939, the declaration of trust was again amended to further reduce the release price." (A. B., p. 6.)

In our opening brief, on pages 6 and 7, we have quoted portions of the complaint filed by appellees in said Superior Court action, wherein appellees allege that from July 30, 1932, until June 1, 1940, moneys were received by the trustee from the proceeds of the sale of the real property in question and were applied in the reduction of the principal and the payment of interest on the note of July 30, 1927. We have also quoted the verified complaint of appellees to the effect that these moneys were so applied in this manner throughout said period, and that at all times during said period the appellees continued to operate under the deed of trust dated July 30, 1927, and Trust No. 5873. [Tr. p. 121.]

In our opening brief we have also called the attention of the Court to the express admission in the appellees' complaint in said Superior Court action that it was the plan and intention of appellees under the amendment of February 9, 1939, that appellees should continue to sell the real property described in the deed of trust and that payments should be made from the proceeds of such sales on the note of July 30, 1927, in the reduction of principal and the payment of interest, and that except for the

*The abbreviation "A. B." will be used throughout this brief to indicate *Appellees' Brief*.

changes in the release prices, the parties should continue to act and perform their respective duties under the original declaration of trust in the same manner as prior to July 30, 1932. [Tr. p. 123.]

Not only have the appellees admitted the validity of the amendment of February 9, 1939, in the Superior Court action and in the within action, including their admissions in their brief herein, but even the quoted testimony of the appellee Frank D. Hall, set forth in appellees' brief on pages 20 and 21, indicates that the appellees have at all times regarded the amendment of February 9, 1939, as valid and binding upon them. In reliance upon this agreement, Mr. Hall testified, and appellees emphasized in their brief, on pages 20 and 21, that he was trying to sell the subdivided lots in question from February 9, 1939 to February, 1941, and that he spent all of his available time in this endeavor.

Appellees now seek to reverse their position completely to challenge the validity of the 1939 amendment. They present the specious argument that the absence of the corporate seal of Farm Home Builders may affect the validity of the document, although the law is well settled that it is not necessary to affix a seal to validate the 1939 amendment.

See:

First National Finance Co. v. Five-O Drilling Co., 209 Cal. 569;

Pacific National Bank v. Corona National Bank, 113 Cal. App. 366.

Furthermore, under Section 1629 of the Civil Code and Section 1932 of the Code of Civil Procedure, all distinctions between sealed and unsealed instruments are now abolished.

The weakness of the position of the appellees is betrayed by their reliance upon the lack of signature of the secretary of Farm Home Builders on the 1939 amendment as a further ground of attack upon its validity. (See A. B., p. 40.)

There is no requirement under the law that this contract be signed by the secretary.

Civ. Code, Section 345;

McCormick v. Stockton, etc. R. R. Co., 130 Cal. 100.

This is particularly true where both Frank D. Hall and Marguerite S. Hall signed the amendment directly below the spaces provided for the corporate signatures.

Greve v. Taft Realty Co., 101 Cal. App. 343;

Arnold v. La Belle Oil Co., 47 Cal. App. 290;

Rauer v. Fernando Nelson & Sons, 53 Cal. App. 695;

Schuyler v. Pantages, 54 Cal. App. 83.

The sufficiency of the signatures of Frank D. Hall and Marguerite S. Hall to bind the corporation is emphasized by reason of the evidence and finding that Farm Home Builders was the *alter ego* of Frank D. Hall and Marguerite S. Hall.

The Conciliation Commissioner-Referee has found that Farm Home Builders Incorporated was created and organized by them, and that Frank D. Hall was at all

times its president and general manager, and Marguerite S. Hall its vice-president. It has also been found that said corporation was wholly owned and controlled by Frank D. Hall and Marguerite S. Hall; the promissory note of July 30, 1927 was individually guaranteed by Frank D. Hall and Marguerite S. Hall, and they received no consideration whatsoever from said corporation for the conveyance of the title to the real property in question to said corporation. [Tr. p. 25.]

The Honorable William C. Mathes, in his memorandum of decision in this case, approved the findings and conclusions of the Conciliation Commissioner-Referee in the following language:

“In 1927 title to the ranch property was in the debtors, Frank D. and Marguerite S. Hall, husband and wife. During that year debtors organized the Farm Home Builders Corporation which they wholly owned and controlled, and thereupon transferred the ranch property to that corporation. The Commissioner has found that the corporation is the *alter ego* of the debtors.” [Tr. p. 58.]

Furthermore, appellees admit in their brief that Farm Home Builders was organized by the appellees in 1927, and that they have wholly owned and controlled it at all times and transferred title to the real property in question to said corporation without consideration. (A. B., p. 4.)

Appellees also admit in their brief that the District Court of Appeal in its opinion reported at 53 Cal. App. (2d) 625:

“ . . . ruled that Farm Home Builders hold title to the property as a constructive trustee for the appellees.” (A. B., p. 7.)

Thus, there can be no doubt of the *alter ego* relationship between appellees and Farm Home Builders. It is respectfully submitted that the signatures of Frank D. and Marguerite S. Hall on the amendment of February 9, 1939, are certainly a sufficient and valid execution of that document, and that both the appellees and Farm Home Builders are bound thereby.

Nowhere have appellees stated that Farm Home Builders was not authorized to enter into the amendment of February 9, 1939, or that Frank D. Hall was not authorized to sign such agreement on behalf of and as president of said corporation, as he did.

The readiness of appellees to deny the validity of the 1939 amendment is indicative of the extremes to which they will go in an attempt to evade the payment of the obligation here involved.

The weakness of the position adopted by appellees is further indicated by their argument on page 41 of their brief that, because Farm Home Builders' corporate powers were suspended for nonpayment of franchise tax at the time of the execution of the amendment of 1939, *appellees* can now repudiate that agreement. Fortunately, the law does not permit the wrongdoer to evade his responsibility by hiding behind his own wrong.

While it is true that the amendment was voidable under Political Code 3669(c) and General Laws, Act 8488, Sec. 32, the only party to the agreement who could have the same declared void was Pan American Bank, acting through the Superintendent of Banks, to whom appellant is successor in interest. Certainly Farm Home Builders never had any right to repudiate the contract for their

own failure to pay the corporate franchise tax, and it is unthinkable that Frank D. Hall and Marguerite S. Hall, who owned and controlled the corporation as their *alter ego*, and who executed and delivered this agreement, and acted in reliance thereon, could repudiate the same.

The very case cited by the appellees in support of their position contains the rule which defeats their contention. In *Depner v. Joseph Zukin Blouses*, 13 Cal. App. (2d) 124, 127, quoted at page 41 of appellees' brief, the Court defines a voidable contract as "*one which is void as to the wrongdoer, but not void as to the wronged party unless he elect to so treat it.*"

See, also:

Myrick v. O'Neill, 33 Cal. App. (2d) 644;

Storrs v. Belmont, etc. Co., 24 Cal. App. (2d) 551.

Even if there were no *alter ego* relation between Farm Home Builders and the appellees, therefore, no right to repudiate the 1939 amendment would lie in appellees. And this conclusion is fortified by reason of said *alter ego* relationship and by reason of the admitted conduct of the parties in the performance of the obligation provided by the 1939 amendment.

We respectfully submit that there was no defect in the execution of the 1939 amendment which in any way affects its validity. But even if one of the minutiae relied upon by appellees on pages 40 and 41 of their brief had any weight whatsoever, it would be a sufficient answer to such a specious claim to say that under the circumstances of the case at bar both Farm Home Builders and appellees are estopped from denying the validity

of the 1939 amendment at this time. Not only did the signatures of the appellees amount to an express ratification of the act of their *alter ego* (*Johnson v. California, etc. Assn.*, 24 Cal. App. (2d) 322), but in view of the sales efforts and payments made by appellees pursuant to the contract for a period of two years from its execution, appellees are estopped from denying its validity. (See: *Boteler v. Conway*, 13 Cal. App. (2d) 79; *Cook v. Central, etc. Co.*, 104 Cal. App. 554; *Berry v. Maywood, etc. Co.*, 13 Cal. (2d) 185; *Pacific Factors, Inc. v. St. Paul Hotel, Inc.*, 113 Cal. App. 657.) And under the circumstances of the case at bar, it is respectfully submitted that the corporation itself is estopped from denying Frank D. Hall's authority to sign the contract on behalf of the corporation as its president.

Wood Estate Co. v. Chanslor, 209 Cal. 241;

Kaplan v. Reid Bros. Inc., 104 Cal. App. 268.

In addition, when appellees sued in the prior State court action, relying upon the 1939 amendment, that in itself was an implied ratification of said agreement so as to estop the appellees from now repudiating their verified complaint in an effort to avoid said agreement. (See *Mannon v. Pesula*, 59 Cal. App. (2d) 597.)

The conclusion drawn by appellees in the closing paragraph of Point IV(c) on page 42 of their brief, relating to the invalidity of the 1939 amendment is, we submit, as unsupported as the grounds upon which they rely

for invalidity. The appellant has, at all times since it acquired the interest on which its instant claim is founded, insisted upon the performance of the provisions of the amendment of February 9, 1939. That amendment provides that other than the changed release prices, "in all other respects the said declaration of trust shall be and remain in full force and effect and binding upon the respective parties hereto." The declaration of trust admittedly provides for a trustee's sale of the property in the event of default in payments.

The provisions of the declaration of trust setting forth the obligation of the appellees are set forth on pages 12 and 13 of our opening brief.

The District Court of Appeal, in its aforesaid opinion, has expressly found that "on November 13, 1939, taxes, principal and interest were in default." (53 Cal. App. (2d) 625, 638.)

Thus, appellant has, at all times since acquiring its interest herein, proceeded pursuant to and in reliance upon the provisions of the aforesaid declaration of trust No. 5873, as amended in 1935 and in 1939, and appellant respectfully prays that the seven years' litigation which have balked its attempt to be paid the full sum owing may be ended by a judgment of this court ordering appellees, as a condition to the removal of the lien and encumbrance of appellant, to pay to appellant the obligation due on the note of July 30, 1927, including principal and interest until paid.

POINT II.

There Is No Evidence of Waiver of Interest.

Declaration of Trust No. 5873 expressly provides that no waiver shall be construed from the acceptance of any overdue sum or from the failure to declare default and proceed with a sale under the declaration of trust.

The trust instrument states as follows:

“The acceptance of any sum or sums secured hereby, principal or interest, after the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a waiver of a right to insist upon the payment when due of all other sums secured hereby and the performance of any or all obligations herein mentioned, and to declare default and to proceed with the sale under this declaration of trust.” [Tr. pp. 289-290.]

The amendment to the trust of February 9, 1939, expressly provides that, except for the change in the schedule of release prices, the original declaration of trust was to continue in full force and effect. [Tr. p. 184.] There is not one iota of evidence showing a direct intention of the parties to waive the interest required by the original Trust No. 5873 whose express purpose is:

“to secure the payment of the indebtedness of the trustor to Pan American Bank of California in the sum of \$45,000.00 and interest thereon, together with any renewal and/or renewals and/or extensions thereof.” [Tr. p. 277.]

The written contract of the parties can be altered only by an express written agreement or an executed oral agreement. (Civ. Code, sec. 1698.) We respectfully submit that the evidence herein fails to show proof of any such alteration.

The most obvious rebuttal to the argument of appellees in Point I of their brief is that the parties expressly reaffirmed the provisions of the original declaration of trust by the amendments executed in 1935 and in 1939. Had there been any intention on the part of any of the parties to alter the obligation to pay interest or to waive accrued interest or subsequent interest, provision would have doubtless been made in the written agreement of the parties for the same. The failure to make such provision, and the express ratification and reaffirmation of the original declaration of trust with the new release prices, is irrefutable evidence that the parties did not intend to alter the obligation to pay interest.

The appellees place great reliance upon the periodic statements of the Citizens Bank, admittedly received by the parties without complaint. And yet, appellees themselves admit, on page 43 of their brief, that:

“The Citizens Bank was not the creditor and was not capable of itself contracting with Farm Builders, or any other person, in reference to the note. It had no power to extend or renew the note or to alter its terms in any way, . . .”

With this statement we heartily concur, and we respectfully submit that it correctly states the law applicable herein, to-wit, that the Citizens Bank was at no time authorized or empowered by any of the parties hereto, or by any of their predecessors in interest, to alter or modify the terms of the written agreements among the parties. An examination of the transcript will confirm this position by revealing that there is no evidence of an oral or written authorization by any of the parties to said bank to alter or modify the agreements of the parties.

Appellees also seek to rely upon an asserted waiver of interest by the Superintendent of Banks. Here again their own brief reveals the weakness of such a position, for it is admitted on page 22 of the appellees' brief that the only indication of a waiver by the Banking Commissioner was an asserted offer in 1939 by Mr. McFaul to Mr. Hall to settle the entire indebtedness for a lump-sum payment of \$15,000.00.

Three things are immediately apparent:

(1) Appellees did not pay said sum of \$15,000.00, or any other sum, in full payment of their obligation at that time or at any time thereafter.

(2) Mr. McFaul was merely endeavoring to wind up the affairs of Pan American Bank and to recommend to the Banking Commissioner a settlement of the claim against appellees for a lump sum payment. He himself had no proved power or authority to release appellees from any obligation whatsoever.

(3) It is interesting to note, in addition, that there is an element of inherent improbability in the testimony of Mr. Hall, quoted on page 22 of appellees' brief, for it there appears that the Deputy Banking Commissioner was willing to accept \$15,000.00—but was *not willing to accept \$18,000.00*—in full payment of the obligation of appellees. Why the Deputy Banking Commissioner should be willing to recommend a settlement for \$3,000.00 less than the appellees were willing to offer, is difficult, if not impossible, to explain.

If there was any intention on the part of Citizens Bank to so word their ledger sheets and periodic statements of account as to provide a waiver of interest, surely on a

matter involving such considerable sums of money as were here involved some written notation of an express waiver of interest would have been made at some time during the many years of the existence of the trust. Yet there is *no* evidence that the Citizens Bank *at any time* recorded anywhere on its books or advised in writing any of the parties hereto or their predecessors in interest that any interest was to be waived.

On the contrary, appellees themselves cited the testimony of Mr. C. M. MacFarlane, Assistant Trust Officer of Citizens Bank, who had supervision of all accounting in the Trust Department since 1928, and under whose general supervision all of the statements of account were prepared, *that he did not know why interest was not included.* (A. B., pp. 23 and 24.)

Thus, there is no evidence that the Citizens Bank ever intended that its periodic statements of account should be used as a device by the appellees for evading their liability to pay interest on the obligation herein involved. (See *Nelson v. Chicago Mill & Lumber Corp.*, 76 F. (2d) 17.)

An interesting analogy on the subject of *waiver* is the case of *Thompson v. Gerner*, 104 Cal. 168. Plaintiff sued to foreclose a mortgage given to secure a promissory note. The note provided for the payment of monthly interest at the rate of 8 per cent per annum and that "if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent per month." Delinquent payments were accepted with monthly interest at the rate of 8 per cent per annum for

several months. The question on appeal was whether or not plaintiff, by accepting a lesser rate of interest than that provided, had waived the right to demand 1 per cent a month in the future.

The Court in that case quoted Section 1698, Civil Code, which provides that:

“A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise.”

The Court then said:

“. . . Under the principle of this section the plaintiff was entitled to recover interest at one per cent per month for the time during which she refused to accept, and did not accept, interest at eight per cent per annum. She did not contract in writing to change the interest as expressed by the written terms of the note; and her acceptance of the eight per cent was of no higher dignity than an express oral agreement. But it was an *executed* agreement only as to months for which she accepted the interest at eight per cent; as to the future it was executory (*Erenberg v. Peters*, 66 Cal. 114; *Taylor v. Soldati*, 68 Cal. 27; *Simmons v. Hamilton*, 56 Cal. 493), and void under said section of the code. (*Johnson v. Polhemus*, 99 Cal. 240.)”

Not only was there no accord and satisfaction between appellees and the Banking Commissioner, but, even if appellees had paid the principal sum due on their obligation, that in itself would not have been a bar to the subsequent recovery of interest, since the promissory note and declaration of trust expressly provide for the payment of interest.

See:

- New York Trust Co. v. Detroit, T. & I. R. Co.*
1918; (C. C. A. 6th), 251 Fed. 514;
- Nelson v. Chicago Mill & Lumber Corp.*, ante;
- Alabama City, G. & A. R. Co. v. Gadsden* (1913),
185 Ala. 263, 64 So. 91, Ann. Cas. 1916C, 573;
- Bassick Gold Mine Co. v. Beardsley* (1910), 49
Colo. 275, 112 Pac. 770, 33 L. R. A. (N. S.)
852;
- Canfield v. Eleventh School Dist.* (1849), 19 Conn.
529;
- Kimball v. Williams* (1910), 36 App. D. C. 43,
Ann. Cas. 1912B, 1331;
- Rice-Stix Dry Goods Co. v. Friedlander Bros.*
(1923), 30 Ga. App. 312, 117 S. E. 762 (af-
firmed in (1924), 158 Ga. 303, 122 S. E. 890);
- Grennon v. New Orleans Pub. Serv.* (1931), 17
La. App. 700, 136 So. 309;
- American Bible Soc. v. Wells* (1878), 68 Me. 570,
28 Am. Rep. 82;
- Davis v. Harrington* (1894), 160 Mass. 278, 35
N. E. 771;
- Stone v. Bennett* (1843), 8 Mo. 41;
- Fake v. Eddy* (1935), 15 Wend. 76;
- Crane v. Craig* (1921), 230 N. Y. 452, 130 N. E.
609 (affirming as modified order in (1920) 193
App. Div. 791, 184 N. Y. S. 740);
- Smith v. Buffalo* (1896), 39 N. Y. S. 881;
- Balfour & K. Co. v. Ranow* (1926), 127 Misc.
21, 215 N. Y. S. 181;
- King v. Phillips* (1886), 95 N. C. 245, 59 Am.
Rep. 238;

Standard Grocery Co. v. C. D. Taylor & Co.
(1917), 175 N. C. 37, 94 S. E. 520;

Graveson v. Odd Fellows' Temple Co. (1897), 4
Ohio N. P. 112, 6 Ohio D. N. P. 287;

Bennett v. Federal Coal & Coke Co. (1912), 70
W. Va. 456, 74 S. E. 418, 40 L. R. A. (N. S.)
588, Ann. Cas. 1913E, 578.

Appellees in their brief place considerable reliance on the fact that part payments were received by appellant and its predecessors in interest in a lesser amount than that currently due. In our opening brief we have explained that the reason for the acceptance of these payments was the general financial depression that began in 1929 and impeded the sales of the property here involved and induced forbearance in collection of the obligation due. But such forbearance, particularly in the light of the amendments of 1935 and 1939 to the trust do not amount to a waiver of interest. The general rule is stated in 47 Corpus Juris Secundum 40, that:

"The acceptance of the principal and a part of the interest due is not a waiver of the entire amount of interest due where interest is expressly reserved by the contract and forms a part of the debt . . .

"Where the right to interest is based on a contract, which provides therefor, the acceptance of payment of the principal debt does not waive the right to interest, and, . . . does not preclude a subsequent recovery of such interest; . . ."

It is extremely interesting to note that in their Petition for Determination of Amount of Existing Lien and Encumbrance, appellees utterly fail to allege or claim that there had been any waiver of interest. [Tr. pp. 8-12.]

It is also interesting to note that in said petition appellees admitted that they had paid not less than \$13,669.68 as interest on the note of July 30, 1927. [Tr. p. 9.]

Strictly speaking, the defense of waiver of interest is therefore not even properly before this court. Even if it were, however, under the facts of this case we respectfully submit that there is no evidence of any waiver of interest and that the appellees should be required to pay their full obligation, including principal and interest, as a condition to the removal of the lien of appellant.

POINT III.

Under the Terms of the Note in Question, 7% Interest, Compounded Quarterly, Is Payable Both Before and After Maturity and Until Payment Is Actually Made.

In Point II of appellees' brief it is sought to be proved that, where a promissory note provides for interest "until paid," such a provision does not include a promise to pay interest after maturity.

Appellees also seek to prove that, where a note provides that "should interest not be so paid, it shall become part of the principal and thereafter bear like interest"—such provision applies before maturity only.

Let us first examine the cases cited by appellees to prove that where a note provides for interest "until paid" it does not mean interest "until paid" but means only interest "until maturity."

Puppo v. Larosa, 194 Cal. 717; *U. S. National Bank v. Waddingham*, 7 Cal. App. 172, and other cases relied on in Point II of appellees' brief are distinguishable from

the case at bar. The *Puppo* case and the *Waddingham* case are illustrations of written obligations which expressly provided that they bore *no interest* after maturity. Yet in each of these cases, and in many others, including those where no mention was made of interest after maturity, and which did not provide for interest "until paid," *California courts have nevertheless allowed such interest.* (*Kohler v. Smith*, 2 Cal. 597; *Malone v. Roy*, 107 Cal. 518; *Nesbitt v. MacDonald*, 203 Cal. 219; *U. S. v. Foreman*, 102 Cal. App. 756; *Kennedy v. Dutton*, 116 Cal. App. 510; *Pitzer v. Wedel*, 73 A. C. A. 86.)

All of the foregoing cases, including the *Puppo* case and the *Waddingham* case, illustrate the proposition that under the law of California, where one person lends money to another, with a promise to repay on a date certain, and such money is not then repaid, the law invokes an implied promise to pay interest from date of maturity, *even where no interest has been provided for by the agreement of the parties.* Appellees now seek to take this salutary rule of providing reasonable compensation for the use of money to a lender, and to distort it so as to avoid paying interest on the obligation here involved from 1936 to the present date. Far from supporting the position of appellees, the rule of law which allows interest after maturity even where *none* was provided, is entirely consistent with the *allowance* of interest after maturity, where the instrument provides for interest "until paid."

In the *Waddingham* case the note provided for *no interest* until paid—and also provided for a definite rate of interest after maturity if not paid at maturity. It is clear that the only way of reconciling these two provisions contained in the promissory note was to interpret it,

as the Court did, to require no interest until maturity, and the agreed rate after maturity. Such an interpretation, however, completely fails to support the proposition advanced by the appellees. And it is respectfully submitted that, where a note provides for interest at an agreed rate until paid, and makes no specific reference to any change of rate after maturity, the words "until paid" should be interpreted to mean until actually paid, whether such payment be made before or after maturity.

In addition to the cases cited in our opening brief on this point, the attention of the Court is respectfully called to the following authorities: *Shepherd v. Pepper* (1889), 133 U. S. 626, 33 L. Ed. 706, 10 Sup. Ct. Rep. 438; *New Orleans v. Warner* (1899), 175 U. S. 120, 44 L. Ed. 96, 20 Sup. Ct. Rep. 44; *Fauntleroy v. Hannibal* (1879), 5 Dil. 219, Fed. Cas. No. 4,692, affirmed in (1881) 105 U. S. 408, 26 L. Ed. 1103; *Northwestern Mut. L. Ins. Co. v. Perrill* (1879), 4 Ohio L. J. 196, Fed. Cas. No. 10,339; *Sanford v. Savings & L. Soc.* (1895), 80 Fed. 54; *Lockwood v. Lindsey* (1895), 6 App. D. C. 396; *Bank of Illinois v. Stickney* (1842), 5 Ill. 4; *Dudley v. Reynolds* (1863), 1 Kan. 285; *Small v. Douthitt* (1863), 1 Kan. 335; *Crosthwait v. Misener* (1877), 13 Bush. 543; *White v. Curd* (1887), 86 Ky. 191, 5 S. W. 553; *McNeil v. Watkins* (1894), 15 Ky. L. Rep. 780; *Duran v. Ayer* (1877), 67 Me. 145; *Augusta Nat. Bank v. Hewins* (1897), 90 Me. 255, 38 Atl. 156; *Taylor v. Wing* (1881), 84 N. Y. 471; *O'Brien v. Young* (1884), 95 N. Y. 428, 47 Am. Rep. 64; *Wilcox v. Van Voorhis* (1891), 58 Hun. 575, 12 N. Y. S. 617; *City Real Estate Co. v. MacFarland* (1910), 67 Misc. 286, 122 N. Y. S. 477; *Zimmermann v. Klauber* (1910), 139 App. Div. 26,

123 N. Y. S. 642; *Sands v. Gilleran* (1913), 159 App. Div. 37, 144 N. Y. S. 337; *Morrisania Sav. Bank v. Bauer* (1881), 3 Month. L. Bull. 102; *Lanahan v. Ward* (1876), 10 R. I. 299; *Mobley v. Davega* (1881), 16 S. C. 73, 42 Am. Rep. 632; *Miller v. Hall* (1882), 18 S. C. 141; *Miller v. Edwards* (1882), 18 S. C. 600; *Bowen v. Barksdale* (1890), 33 S. C. 142, 11 S. E. 640; *Jensen v. Lichtenstein* (1915), 45 Utah 320, 145 Pac. 1036; *Smith v. Deane*, 125 Wash. 368; *Davis v. Anderson*, 224 Ala. 400, 140 So. 423; *Benjamin Moore & Co. v. O'Grady*, 9 Cal. App. (2d) 695, 50 P. (2d) 847; *Pacific Finance Co. v. Lillie*, 27 A. (2d) 794 (Conn. 1942); *Merchants Finance Co. v. Goldweber*, 35 N. E. (2d) 780 (Ohio 1941); *Mutual Sav. & Bldg. Assn. v. Canon Block Inv. Co.*, 67 Colo. 75, 185 Pac. 649.

In *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 Fed. 363, the obligation to pay interest "to the date of payment of the amount" was held to require interest after maturity and until full payment.

In *Shepherd v. Pepper*, *supra*, the Court, referring to notes which bore interest "at the rate of 9 per cent per annum until paid," says: "In regard to allowing interest on the principal of the notes at the rate of 9 per cent per annum until paid, it is to be said that such was the contract in each note."

In *Lockwood v. Lindsey*, *supra*, it is held that a judgment on a note bearing interest "at the rate of 8 per cent per annum from the date hereof until paid," made and payable in a foreign jurisdiction where such rate was legal, was properly rendered for the amount of the principal sum for which the note was given, with interest

thereon at the rate of 8 per cent per annum from the date of the note until paid.

The case of *Bank of Illinois v. Stickney*, *ante*, involved notes drawing interest at a specified rate from date until paid; a mortgage on a stock of goods, etc., authorizing a sale before the maturity of the notes, if deemed necessary by the mortgagee, was given as security for the notes; by subsequent agreement the goods were sold before maturity of the notes, and notes payable at a date after the maturity of the original notes were taken in payment therefor. It was held that the mortgagee was entitled to his interest on the original notes until the maturity of the sale notes.

It is held in *Dudley v. Reynolds* and *Small v. Douthitt*, *ante*, that a promissory note bearing interest at a specified rate "until paid" binds the maker to pay the specified rate for the use of the sum named in the note until the debt is paid, and not merely until maturity of the note.

In *Crosthwait v. Misener*, 13 Bush (Ky.), 543, it is held that a note with interest "at the rate of 10 per cent per annum from date until paid" bears interest at that rate until actual payment. This case even went to the extent of requiring sale bonds given on a coercive sale of the maker's property in payment of the claim, and running for six months to bear the same rate of interest as the note itself.

White v. Curd, 86 Ky. 181, 5 S. W. 553, involved a note made payable with interest from date at a specified rate, but it was shown that it should have been with interest at that rate from date "until paid." The Court held that the note, as it read, would have borne interest

at the specified rate only until maturity, and thereafter at the legal rate, but that, with the mistake corrected, it would bear interest at the specified rate until payment.

In *McNeil v. Watkins*, 15 Ky. L. Rep. 780, an action upon a note which, by its terms, bore 10 per cent interest from date, it was claimed by the plaintiff that the agreement was that the note should bear this rate of interest until the debt should be paid, and that the words "until paid" were omitted by mistake of the draftsman; this agreement was established as to one of the makers, but not as to others. The Court held that a judgment against the former for 10 per cent was proper, but that as to the other makers, the judgment should not be for a greater rate of interest than 6 per cent after the maturity of the note.

Two notes were involved in the case of *Duran v. Ayer*, 67 Me. 145; one stipulated merely that it was with interest at a specified rate, the other that it was with interest at said rate "till such note is paid." The Court said:

"The notes were on time, and at the rate of 12 per cent. It has been held in such case that after maturity of the note, the plaintiff is entitled to interest by operation of law, and not by any provision of the contract."

This language would seem to make no distinction between the two notes, but liability to pay interest on the second note at the rate specified therein to the time of trial, which was long after maturity, seems to have been conceded.

In the late Maine case of *Augusta Nat. Bank v. Hewins*, 90 Me. 255, 38 Atl. 156, it is held that a promissory note payable at a certain time after date with interest at the rate of 9 per cent until paid bears interest at that rate

after the maturity of the note as well as before. The Court calls particular attention to the use of the words “until paid,” and says:

“It had already been decided that without these words such a note would draw the stipulated interest till maturity, and only the legal rate of interest (6 per cent) thereafter. *Eaton v. Boissonnault* (1877), 67 Me. 540, 24 Am. Rep. 52. We think it was to guard against this result that the words ‘until paid’ were inserted in the note now under consideration.”

It is held in *Mobley v. Davega*, 16 S. C. 73, 42 Am. Rep. 632, that a note payable twelve months after date, “with interest from date at 12½ per cent per annum, interest payable annually,” and described in a mortgage executed contemporaneously to secure its payment, as a note “with interest thereon at the rate of 12½ per cent per annum till paid,” draws the same rate of interest after maturity as before. The Court bases its conclusion partially on the fact that the note itself, though running only one year, provides that interest shall be payable annually, thus indicating “a mutual stipulation for an indefinite extension,” of credit, and annual payment of interest during the extension, but the decision is also rested upon the words “till paid,” used in the description of the note in the mortgage.

The note sued on in *Bowen v. Barksdale*, 33 S. C. 142, 11 S. E. 640, was made payable “twelve months after date with interest from date (at) 10 per cent per annum . . . and if not paid at maturity the interest to be added to the principal and bear interest, and so continue until the note is paid.” It was held that interest at the rate specified should be added to the principal after maturity of the note annually.

In *City Real Estate Co. v. MacFarland*, 67 Misc. 286, 122 N. Y. Supp. 477, the Court says:

“The mortgage in suit provides for the payment of the debt on December 13, 1906, with interest thereon to be computed at and after the rate of $5\frac{1}{2}$ per cent per annum until the whole of said principal sum is paid. Under such a provision the contract rate of interest governs until payment of the principal, or until the contract is merged in the judgment.”

Morrisania Sav. Bank v. Bauer, 3 Month. L. Bull. (N. Y.) 102, involved a bond and mortgage providing for the payment of interest at the rate of 7 per cent per annum until the principal sum should be paid. It was held that this rate of interest would apply until the principal sum was paid, or until judgment was rendered, in spite of a change in statute reducing the legal rate of interest, but not affecting contracts already existing.

A few New York cases which might appear to be opposed to the general rule in that state really support it, but are distinguished on the ground that the words relied on in each case were not equivalent to the expression “until paid.”

In *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129, it is held that a provision in a bond for the payment of a specified sum in four equal annual payments, that it should be “with interest semi-annually on all sums remaining from time to time unpaid,” is not like an agreement to pay interest on a principal sum until that principal sum is paid, and hence that the bond would bear interest at the specified rate only until maturity, and thereafter only at the legal rate.

Weyand v. Park Terrace Co., 135 App. Div. 821, 120 N. Y. Supp. 192, was an action to foreclose a mortgage bearing less than the legal rate of interest, and containing a provision that the whole of the principal sum should become due upon default of the payment of interest. The mortgagee elected to declare the principal due, and, in discussing the rate of interest which should be allowed thereafter, the Court says:

“If the obligation had been to pay interest until the principal sum was paid, then the rate determined in the obligation must have obtained until the contract was merged in the judgment.”

This case was subsequently reversed in (1911) 202 N. Y. 231, 36 L. R. A. (N. S.) 308, 95 N. E. 723, Ann. Cas. 1912D, 1010, on the ground that there had been no default, but without any allusion to the question of interest.

The interest provision in the mortgage considered in *Savage v. Beecher*, 139 N. Y. Supp. 173, read:

“With interest thereon at the rate of $4\frac{1}{2}$ per cent per annum, such interest as may have then accrued to be paid on the first day of June, 1895, and thereafter interest to be paid semi-annually on each first day of June and December, until the principal sum hereby secured shall be paid and on the day when said principal sum shall be paid.”

It was held that this clause simply provided that until the principal sum should be paid, the obligor should pay interest semi-annually on the date specified, and was not intended to fix the rate of interest after maturity.

Miller v. Hall, 18 S. C. 141, involved a bond conditioned for payment in five equal annual instalments “with inter-

est payable annually from date upon the whole amount unpaid and at the rate of 10 per centum per annum." It was held that the bond bore annual interest at the specified rate after maturity of the last instalment as well as before, the Court construing the words "upon the whole amount unpaid" as equivalent to the words "till paid." The case of *Miller v. Edwards*, 18 S. C. 600, involved the same points as *Miller v. Hall* (S. C.), *supra*, and was heard with it, and a similar decision rendered. In each of these cases there was a dissenting opinion, but it goes only to the question as to whether the words used in the bond were equivalent to the words "till paid," and does not dispute the conclusion of the prevailing opinion that if the latter expression had been used, the effect would have been to continue the specified rate of interest after maturity.

In *Fauntleroy v. Hannibal*, 5 Dill. 219, Fed. Cas. No. 4,692, affirmed without discussion of this point in 105 U. S. 408, 26 L. Ed. 1103, it is held that municipal bonds bearing interest at the rate of 10 per cent per annum, payable upon presentation of coupons, "until the payment is well and truly made of the said principal sum," would bear interest at the rate of 10 per cent after maturity, although the coupons themselves, which contained no provision as to interest, would bear interest only at the rate of 6 per cent after the date upon which they were payable.

In *New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96, 20 Sup. Ct. Rep. 44, it is held that warrants issued by a city under a statute providing that they should be paid from a certain fund, and that if on presentation there were not sufficient moneys in such fund to meet them, they should thereafter bear interest at a prescribed

rate above the legal rate of interest “until paid,” such provisions being also expressed in the warrants themselves, would bear interest at the prescribed rate from the time of their presentation until actually paid.

The exact wording of the provision for interest considered in *Sanford v. Savings & L. Soc.*, 80 Fed. 54, cannot be determined from the report of the case, but the court held that the agreement of the parties was that the original debt should bear interest at the specified rate until paid, and hence that the rate was not affected by the date of maturity.

The general rule is summarized in 47 C. J. S. 49, as follows:

“Thus, as the contract provides for a certain rate of interest until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity; in other words, the contract governs until the payment of the principal or until the contract is merged in a judgment.”

In 47 C. J. S. 50, it is further stated as follows:

“Where a debt is payable in instalments, with interest at an agreed rate on such instalments, such rate has been held to govern after the instalment becomes due and payable, as well as before its maturity; . . .”

The most recent case found on the subject is *In re Realty Assoc. Securities Corp.*, 66 Fed. Supp. 416, in which the Court says, at page 419:

“It has been held that a contract which provides a rate of interest ‘until the principal shall be paid’ must be construed as evidencing the intention of the parties that the contract rate should govern to and

including the time when the principal debt is actually satisfied, however long after maturity that may be.”

The Court cites the following authorities:

O'Brien v. Young, 95 N. Y. 428;

Zimmermann v. Klauber, 139 App. Div. 26, 123 N. Y. Supp. 642;

In re Oklahoma Ry. Co., 61 Fed. Supp. 96 (Dist. Ct. Okla. 1945);

Taylor v. Wing, 84 N. Y. 471;

City Real Estate v. MacFarland, 67 Misc. 286, 122 N. Y. Supp. 477;

Canadian Car & Foundry Co. v. American Can Co., 258 Fed. 370.

In Point II of their brief, appellees also attack the allowance of compound interest at any time—and particularly after maturity. The weakness of appellees' argument is indicated by the quotation from *Robertson v. Dodson*, 54 Cal. App. (2d) 661, 665, relied upon by appellees, that where the intention of the parties to allow compound interest is clearly expressed in writing and signed by the party to be charged, such interest will be awarded by the courts.

This rule is also set forth in *Schneider v. Turner*, 10 Cal. (2d) 771.

How much more clearly could the intention of the parties on this subject be set forth than was done in the case at bar, where the note expressly provides: "Should interest not be so paid, it shall thereafter become part of the principal and thereafter bear like interest"?

It is extremely interesting to note that appellees, in the last paragraph on page 33 of their brief, admit that the *rate* of interest both before and after maturity remains at 7 per cent, and that at least as to the *rate*, the advent of maturity makes no difference.

If, therefore, the obligation to pay interest "until paid" requires payment after maturity and until actual payment, and if the provisions concerning the compounding of interest are clear, the appellant and appellees are at least agreed as to one thing; that is, that the applicable rate after maturity will be the same as that provided before maturity. It is equally clear from the instrument itself that the rate applicable before maturity is interest "at the rate of seven (7%) per cent per annum, payable quarterly, in advance."

Appellant and appellees are in accord on one additional point, and that is that the following language in the case of *Puppo v. Larosa*, ante, at page 720, is the law of the State of California:

"When money is not paid according to the terms of a note, the holder suffers a detriment properly compensable in damages, which courts have generally adjudged to be the rate of interest agreed upon in the note, if it be within the legal rate (Sec. 3289, C. C.) *between maturity and the date of judgment.*" (A. B., p. 31.)

We therefore respectfully submit that in the light of the authorities quoted above, since the instant obligation provides for interest *until paid*, interest is provided until date of *actual* payment herein, and that such interest continues at the same after maturity as it was before maturity, to-wit, 7 per cent per annum, compounded quarterly.

In the case at bar, as noted above, there was no express intention on the part of the trustee-bank or any of the parties hereto, or their predecessors in interest, to waive any interest. The only consent that may be deemed to have been given to the periodic accounts submitted by the trustee-bank is that the meager amounts of money which were available could be applied to the reduction of principal rather than to the payment of interest.

In *Star Stationery Co. v. Rogers*, 88 F. (2d) 482 (C. C. A. (3d) 1937), it was held that a payee on a written obligation does *not* waive interest on the unpaid balance of principal after maturity by failing specifically to apply the payments received to interest. The Court deemed it proper for the parties to apply the part payments as they saw fit, without disturbing their contractual obligation.

Similarly, in *Nelson v. Chicago Mill & Lumber Corp.*, 76 F. (2d) 17, it was held that where a contract for lumber required 6 per cent per annum interest on deferred payments, plaintiff's acceptance of principal did not preclude the recovery of interest in accordance with the contract.

Thus, we respectfully submit that, since loans are presumed to be made on interest unless otherwise stated in writing (*Wells Fargo Co. v. Enright*, 127 Cal. 669; *Semi-Tropic, etc. Assn. v. Johnson*, 163 Cal. 639), and since the parties have expressly agreed here for 7 per cent interest per annum, compounded quarterly, until the entire obligation be paid, and since the application of partial payments to reduction of principal does not alter the obligation of the parties, appellees should, under the law and in equity and good conscience, be required to pay said obligation in full.

POINT IV.

Interest Should Be Allowed From the Inception of the Proceedings Under Section 75 to Date.

In addition to the authorities cited in their opening brief, we respectfully call the attention of the Court to certain additional cases which have followed the general rule that, where the estate of a bankrupt turns out to be sufficient to pay all claims in full and leave a surplus over, interest will be allowed on all claims during the administration of the estate. (*Nolte v. Hudson Nav. Co.* (1925, C. C. A. 2d) 8 F. (2d) 859; *Central Nat. Bank v. Bate-man & Cos.* (1925), Del. Ch., 131 Atl. 202 (rule recognized).

And in *In re People, ex rel. Emmet* (1925), 125 Misc. 806, 212 N. Y. Supp. 258, the Court, citing *People v. American Loan & T. Co.* (1902), 172 N. Y. 379, 65 N. E. 200, said that as against stockholders of a corporation, interest is chargeable down to the time of the payment of claims in insolvency, before there can be a return of any surplus to them.

The case of *Ohio Sav. Bank & T. Co. v. Willys Corp.*, 8 F. (2d) 463, concedes that interest will be allowed on claims against an estate in the hands of a receiver if the assets prove to be more than sufficient to pay the principal of all allowed claims.

Even if appellant were to concede that the testimony of Frank D. Hall, quoted on pages 15 and 16 of the appendix to appellees' brief, were not a change from his testimony set forth on pages 14 and 15 of said appendix—*there is, nevertheless, a surplus in the bankrupt estate*

herein sufficient to allow the payment of interest as claimed and prayed for by appellant.

Appellant concedes that \$49,878.38 in cash is being held by the trustee-bank, subject to the order of the Court herein. [Tr. p. 30.] Viewing Frank D. Hall's testimony in the meaning claimed by his attorneys in their brief, the value of the remaining real property is approximately \$35,000.00. (A. B. p. 58.) Thus, according to appellees' own figures, the total net value of the appellees' estate is the sum of \$84,878.38.

The claim of appellant as of September 1, 1947, is for the sum of \$77,591.51.

Thus, there are clearly sufficient assets in the estate to pay the claim of appellant in full. And it is particularly appropriate that such claim be paid in this case, because appellant is the sole creditor of the appellees.

Appellees claim, on page 56 of their brief, that the fact that certain moneys are held by the Court, is sufficient to stop the running of interest on the obligation herein involved. We respectfully submit that this view is erroneous. Section 1494, Civil Code provides that:

“An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform.”

And it has been held that the imposition of unwarranted conditions amounts to a refusal of performance rather than a tender of performance, which would stop the running of interest. (*Woody v. Bennett*, 88 Cal. 241; *Roffinella*, 191 Cal. 753; *Laiblin v. San Joaquin Ag. Corp.*, 60 Cal. App. 516.)

It is respectfully submitted that, since the only condition upon which the money on deposit with the trustee bank subject to court order, would be available to the appellant would be upon the removal of appellant's lien from the property of appellees, and since appellant respectfully contends that its lien and claim is greater in amount than that heretofore determined by the Court, the availability of money within the control of the Court to pay appellant was combined with an unreasonable condition and therefore does not amount to a tender of performance sufficient to stop the running of interest. For appellant to have accepted the money held subject to the order of the Court, would have involved a forfeiture by the appellant of its claimed right to more than \$40,000.00 in excess of the amount ordered to be paid to appellant by the District Court.

The rule is stated in 47 C. J. S. 65, that:

"Interest will not be suspended if the condition is unreasonable or one which the debtor has no right to impose." (*Taylor v. Hemphill*, 238 S. W. 986 (Tex.).)

Similarly, it has been held that the mere taking of an appeal does not in itself stop the running of interest. (*In re Borden's Will*, 50 N. Y. Supp. (2d) 715, 182 Misc. 501.)

In 47 C. J. S. 69, the following appears:

". . . it has generally been held that a mere modification of the judgment below does not suspend the running of interest pending the appeal, . . . where the amount for which the judgment was rendered is increased on appeal. (*The Kia Ora*, 252 Fed. 507, 164 C. C. A. 423.)"

Conclusion.

In Point VII of appellees' brief, the attempt is made to deny the effect of the judgment in *Hall v. Citizens National Bank*, 53 Cal. App. (2d) 625, by asserting that a new trial will be required.

It is respectfully submitted that there is no issue left to be tried in that case. Appellees sought permanent and temporary injunctive relief against the sale of the property included within the declaration of trust and the deed of trust which are the subject of this suit. No further appeal lies at this time from the said decision of the District Court of Appeal. Since no injunctive relief of any kind can be granted to appellees against the enforcement of the obligations which are the subject of the instant litigation, it appears that there is no issue left to try upon a new trial and that the aforesaid decision of the District Court of Appeal has become and is now a final judgment. And it is respectfully submitted that said judgment is final under the well recognized rule in California, not only as to all matters which were asserted by appellees as grounds for injunctive relief therein, but also as to any additional grounds which might have been asserted by appellees and which they now seek to assert in the instant case.

It is therefore respectfully prayed that this Court reverse the order of the Honorable District Court herein and remand this case with instructions that the money now under control of the District Court be forthwith

distributed to appellant as a *pro tanto* payment of the obligation of appellees, and that the remaining real property in question be sold forthwith and the net proceeds applied in payment of the full obligation of appellees on the principal sum of \$45,000.00, with interest thereon from July 30, 1927, to date of payment, at the rate of 7 per cent per annum, compounded quarterly, and with credit for all payments made to date.

Respectfully submitted,

GEORGE T. GOGGIN, and
MARVIN WELLINS,

By MARVIN WELLINS,

Attorneys for Appellant.



No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

Appellees' Petition for a Rehearing After Decision of
the United States Circuit Court of Appeals for
the Ninth Circuit.

FILED
APR 8 - 1948

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APPELLEES' PETITION FOR A REHEARING.

*To the Honorable Justices of the United States Circuit
Court of Appeals, for the Ninth Circuit:*

The Petition of Frank D. Hall and Marguerite S. Hall,
appellees, for a rehearing respectfully shows:

Status of the Appeal.

Under date of March 9, 1948, this Honorable Court filed its opinion herein, wherein it reversed the judgment of the District Court of the United States for the Southern District of California, Central Division, and remanded the cause with directions to the District Court to enter judgment in accordance with the views expressed in the said opinion.

Grounds for a Rehearing.

The appellees now urge that the decision of this Honorable Court is erroneous, and that this Court should give reconsideration to the questions relating to waiver of interest and to the compounding of interest after maturity, in order that there may be uniformity of decision upon those questions.

In this connection, it appears from the record, that the sole purpose of the proceeding in the District Court was to determine the amount of the debt of the appellees to the appellant; that the appellees successfully contended in the District Court that interest had been waived on the principal of the debt from the maturity of the debt; that the Conciliation Commissioner, however, acting on the principle that the appellees should do equity, since they sought equity, allowed simple interest at 7% per annum, on the principal of the debt for four years after its maturity; that the appellant, among other grounds of appeal, alleged error of the District Court in finding that there had been a waiver of interest and asserted that appellant should have been allowed compound interest from the maturity of the note until the actual payment of the note; that this Court reversed the District Court on the question of waiver and held that the appellant was entitled to compound interest to the date bankruptcy proceedings were initiated; that reference is made to the opinion of this Honorable Court for the full scope thereof.

POINTS ARGUED ON THIS PETITION FOR A REHEARING.

I.

Interest Was Waived.

The following is quoted from the opinion of this Honorable Court as it appears on page 5 thereof:

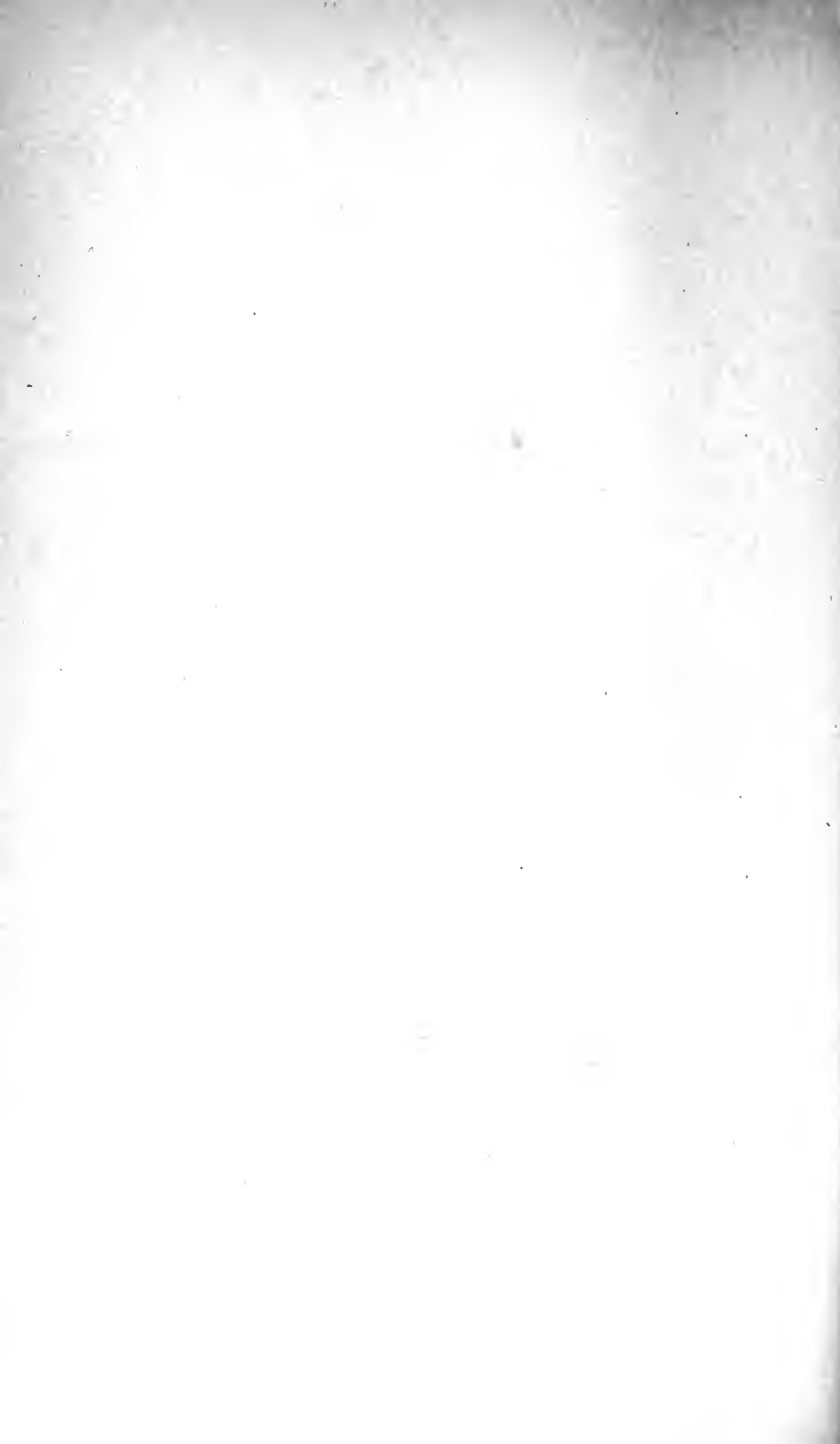
“At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, there must be a clear unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right or acts amounting to an estoppel on his part (citing authorities). No such intent, or course of conduct on the part of appellant appears.”

We have no criticism of the foregoing general statement of the law. It is appellees' position, however, that there were clear, unequivocal and decisive acts of State Banking Department in charge of the liquidation of Pan-American Bank of California which showed its intention to waive interest, and that the trier of the fact, the District Court (first by its Conciliation Commissioner, and second, on review by the District Judge) properly held that there had been a waiver and that, as to the years from 1932 to the Fall of 1939, in which latter year the appellant first became the owner of the note, the appellant was a complete stranger to the transaction; that when appellant acquired the obligation, it took it subject to any infirmities in the hand of the liquidator; that the

note had been overdue since July, 1932; that the maturity had never been extended and that the appellant was not a holder in due course; and that the appellant was bound by the waiver of the former holder. This subject is argued at length by counsel for appellees in appellees' brief—Argument of the Law—Point 1—pages 13 to 28, inclusive. The appellees also rely upon the circumstances that the Conciliation Commissioner found that the annual statements of account which were prepared by Citizens National Bank of Los Angeles, Trustee of the subdivision trust and collecting agent for the liquidator, in minute detail, and which purported to show the true balance of the unpaid obligation at the end of each year from 1933 to 1938 inclusive, were accepted by the liquidator as true statements of the obligation, and "that the said liquidator of Pan-American Bank of California would, at all times during which said liquidator was the owner and holder of said note, have accepted payment of the balance shown in the current account in full satisfaction of the said note, and which facts were known to the Pacific States Corporation at the time of the transfer of the note from said liquidator to said creditor." [Tr. p. 28.] The Conciliation Commissioner also found as follows:

"For the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account."





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The appellees now urge that the decision of this Honorable Court is erroneous, and that this Court should give reconsideration to the questions relating to waiver of interest and to the compounding of interest after maturity, in order that there may be uniformity of decision upon those questions.

In this connection, it appears from the record, that the sole purpose of the proceeding in the District Court was to determine the amount of the debt of the appellees to the appellant; that the appellees successfully contended in the District Court that interest had been waived on the principal of the debt from the maturity of the debt; that the Conciliation Commissioner, however, acting on the principle that the appellees should do equity, since they sought equity, allowed simple interest at 7% per annum, on the principal of the debt for four years after its maturity; that the appellant, among other grounds of appeal, alleged error of the District Court in finding that there had been a waiver of interest and asserted that appellant should have been allowed compound interest from the maturity of the note until the actual payment of the note; that this Court reversed the District Court on the question of waiver and held that the appellant was entitled to compound interest to the date bankruptcy proceedings were initiated; that reference is made to the opinion of this Honorable Court for the full scope thereof.

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The following is quoted from the opinion of this Honorable Court as it appears on page 5 thereof:

“At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, there must be a clear unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right or acts amounting to an estoppel on his part (citing authorities). No such intent, or course of conduct on the part of appellant appears.”

We have no criticism of the foregoing general statement of the law. It is appellees' position, however, that there were clear, unequivocal and decisive acts of State Banking Department in charge of the liquidation of Pan-American Bank of California which showed its intention to waive interest, and that the trier of the fact, the District Court (first by its Conciliation Commissioner, and second, on review by the District Judge) properly held that there had been a waiver and that, as to the years from 1932 to the Fall of 1939, in which latter year the appellant first became the owner of the note, the appellant was a complete stranger to the transaction; that when appellant acquired the obligation, it took it subject to any infirmities in the hand of the liquidator; that the

note had been overdue since July, 1932; that the maturity had never been extended and that the appellant was not a holder in due course; and that the appellant was bound by the waiver of the former holder. This subject is argued at length by counsel for appellees in appellees' brief—Argument of the Law—Point 1—pages 13 to 28, inclusive. The appellees also rely upon the circumstances that the Conciliation Commissioner found that the annual statements of account which were prepared by Citizens National Bank of Los Angeles, Trustee of the subdivision trust and collecting agent for the liquidator, in minute detail, and which purported to show the true balance of the unpaid obligation at the end of each year from 1933 to 1938 inclusive, were accepted by the liquidator as true statements of the obligation, and "that the said liquidator of Pan-American Bank of California would, at all times during which said liquidator was the owner and holder of said note, have accepted payment of the balance shown in the current account in full satisfaction of the said note, and which facts were known to the Pacific States Corporation at the time of the transfer of the note from said liquidator to said creditor." [Tr. p. 28.] The Conciliation Commissioner also found as follows:

"For the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account."

It was not until the year 1942, which was three years after appellant became the owner of the note—or nearly ten years after the first account, that any statement of account was rendered showing the addition of interest.

As further evidence that interest was waived by the liquidator, reference is made to the letter of March 19, 1936, addressed to F. D. Hall and demanding the payment of the balance due of \$29,356.11 (which sum represented the unpaid principal without the addition of interest from April 1932). [See Debtors' Exhibit 2-7—Appendix to Appellees' Brief p. 10.] And as supporting the finding of the Conciliation Commission, reference is made to the testimony of F. D. Hall set forth in the appellees' opening brief, that the liquidator in 1939 offered to accept even less than the balance of the unpaid principal in settlement, and the testimony of Mr. McFarlane, that the balance of the indebtedness, as of a given date, was as shown in the bank's ledger (and which balance did not include any interest from 1932 to 1939).

We desire to emphasize appellees' contention that there are, in this case, clear, unequivocal and decisive acts of the creditor showing a purpose and intent to waive the interest. And in addition, there is no evidence that the failure to include interest over the eight-year period was due to any mistake on the part of the liquidator, or its agent. If these statements constitute Stated Accounts, as we respectfully assert they do, no proceeding to reform

the same has ever been instituted by appellant or its predecessor.

That the right to claim interest may be waived—see *Estate of Hein*, 32 Cal. App. (2d) 438, which also holds that once a right is waived, it is waived and gone forever.

In *Dee v. J. C. Forkner Fig Gardens, Inc.*, 105 Cal. App. 606, 610, the Court in holding that interest had been waived, said:

“Nor was there any testimony or showing that the defendant had ever made a demand for interest or furnished any statement of the amount due.”

And on the subject of the conclusiveness of waiver, see 56 Am. Jur., subject “Waiver,” §24, p. 126, from which we quote:

“A waiver is conclusive on the party waiving, or his privies. Where parties for whose benefit conditions are imposed waive them, strangers thereto cannot complain.”

The appellant was a stranger to this obligation until the Fall of 1939, and cannot complain of what transpired in the previous years.

As to the sufficiency of the evidence, attention is called to 56 Am. Jur., subject “Waiver,” §23, p. 126, where it is stated:

“The sufficiency of the evidence relating to waiver is for the jury. The jury may be properly instructed

as a matter of law, that a waiver must be voluntary and that it implies a knowledge of the right, claim or thing waived; yet whether it was voluntary and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury.”

The Conciliation Commissioner found all the essential facts to constitute waiver, and his conclusion of law therefrom was proper, and should not be disturbed.

For additional authorities, we rely upon those listed under Point 1 in our opening brief, and in our letter to the Clerk of the Court supplementing the same.

For definitions and requirements of “Account Stated,” we cite:

Coffee v. Williams, 103 Cal. 550;

Gardner v. Watson, 170 Cal. 570;

Merchants Nat. Bank v. Carmichael, 178 Cal. 446;

Beltaire v. Rosenberg & Son, 129 Cal. 164;

Outwaters v. Brownlee, 22 Cal. App. 535,

and as to the setting aside of an Account Stated, to *Rebbock v. Reservoir Hill Gasoline Co.*, 14 Cal. App. (2d) 233, where it was held:

“An Account Stated may be set aside only for fraud, mistake, or upon other grounds invalidating free consent of a contracting party.”

II.

Even if Interest Had Not Been Waived, It Should Not Be Compounded.

This Honorable Court, on page 6 of its opinion, disagrees with appellees' contention that "until paid," as in the present case, should be read as "until maturity," and bases its decision in this connection upon *Bell v. San Francisco Savings Union*, 153 Cal. 64; and *Johansen v. Klipstein*, 104 Cal. App. 128.

We do not deny that where a promissory note expressly provides for the payment of interest at a certain rate "after maturity" or "before or after maturity," or that the interest shall be compounded "after maturity" or "before and after maturity" the contract is binding. The cases cited on this point do not, we respectfully submit, support the decision, but on the contrary, tend to support the contention of appellees. In the note in the first case, the note provided for interest of two-thirds of one per cent per month until payment of the principal and that in the case of default in the payment of principal or interest, such amounts should bear interest at the rate of one per cent per month until paid. The Court, in this case, construed the two-thirds of one per cent rate to apply only until maturity and the one per cent rate after maturity. Clearly, that decision is not against appellees' contentions. The other case, that of *Johansen v. Klipstein*, is not in point at all. There, the express agreement was to pay interest at 7 per cent per annum "from maturity until paid." In appellees' brief on this appeal, the topic under discussion is discussed at length under appellees' Point II, pages 29 to 32, and authorities and texts which support appellees' contentions are referred to and quoted from. We offer the same arguments upon

the point in question, without repeating them here, and cite as additional authority that compound interest is not favored by the Court,

33 C. J., subject "Interest," §33, p. 191;

47 C. J. S., same subject, §29, p. 41; also

47 C. J. S., same subject, §63, p. 72.

In said section 29 of 47 C. J. S., subject "interest," it is stated to be the law, that the acceptance of simple interest on a debt will constitute a waiver of a claim for compound interest thereafter. Despite this law, and despite the fact that simple interest was accepted up to January, 1932 (after which time until the 1940 statement, no interest is credited), the appellant, in August, 1942, had the whole obligation recomputed on a compound interest basis from its commencement. [App. Ex. 2 AA, Tr. pp. 251-266.] This spurious statement, which appellees promptly repudiated, shows the unpaid obligation as of January 30, 1932, to be some \$1,200.00 more than that shown as a result of the endorsements on the note, and appellant will, if the decision of this Court stands, insist upon re-opening the account from the beginning and of spiralling the obligation to an unbelievable and unwarranted height.

It is necessary that interest be added to principal to form a new principal, to enable it to be compounded. At no time during the five years before the maturity of the note, and at no time in the ten years following and until the attempt to recompute the obligation was made by appellant (a stranger to the obligation until 1939), was any interest added to form a new principal for the purpose of compounding the interest. Even had the current

holder been entitled to compound the interest after maturity, which we challenge, the right to do so was clearly and certainly waived.

Appellees respectfully submit that the decision of this Honorable Court is assailable in the respects mentioned, and they maintain that unless the decision is reconsidered and brought into conformity with previous decisions, a great and ruinous and unwarranted wrong will be done them. Appellees, therefore, humbly request that a rehearing be granted them in order that the present appeal may be reheard on the points mentioned, and the decision modified in the respects in which this Honorable Court, on reconsideration, finds it to be in error.

Respectfully submitted,

C. P. VON HERZEN,

EDGAR F. HUGHES,

DAVID A. SONDEL,

Attorneys for Petitioners and Appellees.



It was not until the year 1942, which was three years after appellant became the owner of the note—or nearly ten years after the first account, that any statement of account was rendered showing the addition of interest.

As further evidence that interest was waived by the liquidator, reference is made to the letter of March 19, 1936, addressed to F. D. Hall and demanding the payment of the balance due of \$29,356.11 (which sum represented the unpaid principal without the addition of interest from April 1932). [See Debtors' Exhibit 2-7—Appendix to Appellees' Brief p. 10.] And as supporting the finding of the Conciliation Commission, reference is made to the testimony of F. D. Hall set forth in the appellees' opening brief, that the liquidator in 1939 offered to accept even less than the balance of the unpaid principal in settlement, and the testimony of Mr. McFarlane, that the balance of the indebtedness, as of a given date, was as shown in the bank's ledger (and which balance did not include any interest from 1932 to 1939).

We desire to emphasize appellees' contention that there are, in this case, clear, unequivocal and decisive acts of the creditor showing a purpose and intent to waive the interest. And in addition, there is no evidence that the failure to include interest over the eight-year period was due to any mistake on the part of the liquidator, or its agent. If these statements constitute Stated Accounts, as we respectfully assert they do, no proceeding to reform

the same has ever been instituted by appellant or its predecessor.

That the right to claim interest may be waived—see *Estate of Hein*, 32 Cal. App. (2d) 438, which also holds that once a right is waived, it is waived and gone forever.

In *Dee v. J. C. Forkner Fig Gardens, Inc.*, 105 Cal. App. 606, 610, the Court in holding that interest had been waived, said:

“Nor was there any testimony or showing that the defendant had ever made a demand for interest or furnished any statement of the amount due.”

And on the subject of the conclusiveness of waiver, see 56 Am. Jur., subject “Waiver,” §24, p. 126, from which we quote:

“A waiver is conclusive on the party waiving, or his privies. Where parties for whose benefit conditions are imposed waive them, strangers thereto cannot complain.”

The appellant was a stranger to this obligation until the Fall of 1939, and cannot complain of what transpired in the previous years.

As to the sufficiency of the evidence, attention is called to 56 Am. Jur., subject “Waiver,” §23, p. 126, where it is stated:

“The sufficiency of the evidence relating to waiver is for the jury. The jury may be properly instructed

as a matter of law, that a waiver must be voluntary and that it implies a knowledge of the right, claim or thing waived; yet whether it was voluntary and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury.”

The Conciliation Commissioner found all the essential facts to constitute waiver, and his conclusion of law therefrom was proper, and should not be disturbed.

For additional authorities, we rely upon those listed under Point 1 in our opening brief, and in our letter to the Clerk of the Court supplementing the same.

For definitions and requirements of “Account Stated,” we cite:

Coffee v. Williams, 103 Cal. 550;

Gardner v. Watson, 170 Cal. 570;

Merchants Nat. Bank v. Carmichael, 178 Cal. 446;

Beltaire v. Rosenberg & Son, 129 Cal. 164;

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Respectfully submitted,

C. P. VON HERZEN,

EDGAR F. HUGHES,

DAVID A. SONDEL,

Attorneys for Petitioners and Appellees.

No. 11530

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUN 13 1947

PAUL R. O'BRIEN,
CLERK



No. 11530

IN THE
United States Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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JAMES M. CARTER

U. S. Attorney

ERNEST A. TOLIN

WILLIAM L. RITZI

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building
Los Angeles 12, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

September, 1946, Term

No. 19036

UNITED STATES OF AMERICA,

Plaintiff,

v.

HERMAN HAYMAN,

Defendant.

INDICTMENT

[U. S. C., Title 18, Secs. 78, 73, and 88—Personation of
holder of government obligation, forging and uttering
government check, and conspiracy]

The grand jury charges:

COUNT ONE

[U. S. C., Title 18, Sec. 78]

On or about March 26, 1946, at Los Angeles, Los
Angeles County, California, within the Central Division
of the Southern District of California, defendant Herman
Hayman did falsely personate one Samuel T. Thompson,
a true and lawful holder of a debt of, and due from, the
United States, to-wit: a United States Treasury check,
in words and figures as follows: [2]

Endorsement in ink or indelible pencil, giving their places of residence in full.

Endorse this check-if presented for payment within one year beginning July 1, next, after date of issue (U. S. Code, Title 31, Section 7253). It should be sent by the owner direct to the Secretary of the Treasury and require no payment after settlement of account.

The payee should sign below in ink or indelible pencil.

If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.

Samuel T Thompson
1931 W. 26th Street
Los Angeles Calif.
Thompson

LOS ANGELES BRANCH
FEDERAL RESERVE BANK
MAR 28 1944
RECEIVED ON THE UNITED STATES
MAR 27 1944
128 Canal & Houston Branch
6-101
PAY TO THE ORDER OF
ANY BANK OR BANKER
OR THROUGH
LOS ANGELES CLEAR
ALL OTHER INDICES
Security-Fin
6-3

WAR
FINANCE



TO THE
ORDER OF

No. 8515

WHICH DRAWN:

PAYING OUT
PAY

2-1-520

FORT MACARTHUR, CALIF.,

W-27

728, 823

Treasurer of the United States 15-51
000

PAY One Hundred

Dollars \$100⁰⁰/₁₀₀

SAMUEL T THOMPSON

39723941 SGT

24 MARCH 1946

1931 W 26 ST
LOS ANGELES CALIF

UNITED STATES
Thredman
U.S. FINANCE OFFICE

KNOW YOUR ENDORSER—REQUIRE IDENTIFICATION

213,967

and under color of such false personation did receive and endeavor to receive the money of, and due to, the said true and lawful holder in payment of said debt. [3]

COUNT TWO

[U. S. C., Title 18, Sec. 73]

On or about March 26, 1946, at Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Herman Hayman did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, a certain writing, to-wit: the endorsement and signature of the payee of a United States Treasury check, in words and figures as follows:

WAR

3-1-540
FORT MACARTHUR CALIF.

4-27

728, 8



Treasurer of the United States

13-51
000

PAY

One Hundred

Dollars \$100

SAMUEL T THOMPSON

30723941 NET

24 MARCH 1954

1951 W 24 ST
LOS ANGELES CALIF

PAID
1-5-54
Thompson

213,90

KNOW YOUR ENDORSE-REQUIRE IDENTIFICATION

2-7-2

• Unless this check is presented for payment within one year beginning July 1, next, after date of issue (U. S. Code, Title 31, Section 7254), it should be sent by the owner direct to the Secretary of the Treasury with request for payment after settlement of account.

The payee should guide below in ink or indelible pencil. • • •

If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.

Samuel Thompson
931 W. 26th Street
Los Angeles, Calif.

LOS ANGELES BRANCH
FEDERAL RESERVE BANK
MAR 28 1934
RECEIVED

128 CANTON & S. STATION DIST. N
16-101
MAR 27 1934
PAY TO THE ORDER OF
ANY BANK OR BANKER
OR THROUGH
LOS ANGELES CLE.
ALL NEGOTIATIONS
Security-First

[4]

for the purpose of obtaining and receiving and of enabling certain other persons, whose names are to the grand jury unknown, to obtain and receive from the United States and its officers and agents the sum of \$100.00. [5]

COUNT THREE

[U. S. C., Title 18, Sec. 73]

On or about March 26, 1946, at Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Herman Hayman did utter and publish as true, and cause to be uttered and published as true, a false, forged, and counterfeited writing, to-wit: the endorsement and signature of the payee of a United States Treasury check, in words and figures as follows:

728, 82

\$100⁰⁰/₁₀₀

4 MARCH 194

ED-STATES-AN

Friedman

EAT-CE FINANCE OF

213,967

W.

[6]

with intent to defraud the United States, knowing said writing to be false, forged, and counterfeited. [7]

COUNT FOUR

[U. S. C., Title 18, Sec. 73]

On or about March 6, 1946, at Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Herman Hayman did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, a certain writing, to-wit: the endorsement and signature of the payee of a United States Treasury check, in words and figures as follows:

AR
ANCE



TO THE
ORDER

WHICH DRAWN.

WAR

FORT MACARTHUR, CALIF.

W-27

728, 823



Treasurer of the United States ¹⁵⁻⁵¹ 000

PAY

One Hundred

Dollars \$100 ¹⁵⁻⁵¹
000

SAMUEL T THOMPSON

30723041 807

24 MARCH 1946

1931 W 26 ST
LOS ANGELES CALIF

UNITED STATES
TREASURY
THOMPSON

213.90

KNOW YOUR ENDORSER—REQUIRE IDENTIFICATION

100-2776-4-72 (100-2776-4-72)

It has been found that checks in the face of \$100 or more are being cashed at banks and other financial institutions without proper identification of the endorser. This is a serious matter and it is requested that you advise the endorser of this fact and that you require proper identification of the endorser before cashing the check. If you are unable to obtain proper identification, please return the check to the issuer.

Samuel T. Thompson
1931 W 26 Street
Los Angeles, Calif.

LOS ANGELES BRANCH
MAR 28 1946
MAR 27 1946
MAR 27 1946

LOS ANGELES BRANCH
MAR 27 1946
MAR 27 1946
MAR 27 1946

WAR
FINANCE

CAMP BEALE, CALIF.

5 521-1-1

351,100

Treasurer of the United States ¹⁵⁻⁵¹/₀₀₀

EB 28 1946

PAY

*****282 DOLLARS AND 50 CTS

*****282.50

1ST, LT. CHARLES A. STELSON

1615 E. 47TH. ST.,
LOS ANGELES, CALIF.

YOU NO
25392



ORIG PNT ON YOU 2151-1 JAN 46 ACCTS

213,767

KNOW YOUR ENDORSER—REQUIRE IDENTIFICATION

for the purpose of obtaining and receiving and of enabling certain other persons, whose names are to the grand jury unknown, to obtain and receive from the United [8] States and its officers and agents the sum of \$282.50. [9]

COUNT FIVE

[U. S. C., Title 18, Sec. 73]

On or about March 6, 1946, at Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Herman Hayman did utter and publish as true, and cause to be uttered and published as true, a false, forged, and counterfeited writing, to-wit: the endorsement and signature of the payee of a United States Treasury check, in words and figures as follows:

AR
ANCE



WHICH DRAWN



with intent to defraud the United States, knowing said writing to be false, forged, and counterfeited. [10]

000000

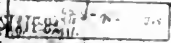
000000

Charlotte, N.C.

Gloria W. Collins

1818

000000



000000

Treasurer of the United States

15-51
000

EB 28 1946



PAY

*****282 DOLLARS AND .50 CTS

*****282.50

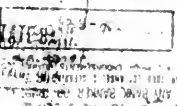
1ST. LT. CHARLIE A. WILSON

1615 E. 47TH. ST.,
LOS ANGELES, CALIF.YOU NO
45392

ORIG FMT ON YOU 2151-1 JAN 46 ACCTS

213,767

KNOW YOUR ENDORSER—REQUIRE IDENTIFICATION

*Charles A. Wilson**Gloria W. Wilson**1615 E. 47th St.*

COUNT SIX

[U. S. C., Title 18, Sec. 88]

Prior to the date of the commission of the overt acts hereinafter set forth and continuously thereafter to and including the date of the finding and presentation of this indictment in Los Angeles County, California, defendant Herman Hayman did corruptly conspire with Dorothy McClain, named as co-conspirator but unindicted herein, and with other persons, whose names are to the grand jury unknown, to commit certain offenses against the United States of America and the laws thereof, to-wit: (1) to make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, a certain writing, to-wit: the endorsement and signature of the payee of United State Treasury check numbered 351,100, dated February 28, 1946, payable to Lt. Charles A. Wilbun in the sum of \$282.50, for the purpose of obtaining and receiving and of enabling certain other persons, whose names are to the grand jury unknown, to obtain and receive from the United States and its officers and agents the sum of \$282.50; and (2) to utter and publish as true, and cause to be uttered and published as true, a false, forged, and counterfeited writing, to-wit: the endorsement and signature of the payee of the United States Treasury check described above in this count, with intent to defraud the United States, knowing said writing to be false, forged, and counterfeited;

After the formation, and in furtherance, of said conspiracy and to effect the objects and purposes thereof, the defendant and co-conspirator did commit various overt acts, among which were the following:

(1) On or about March 6, 1946, at Los Angeles, California, defendant Herman Hayman accompanied co-conspirator Dorothy McClain to the Goodwin Shoe Store;

(2) On or about March 6, 1946, at Los Angeles, California, co-conspirator Dorothy McClain forged the payee's name: Charles A. Wilbun, on the United States Treasury check described above in this count;

(3) On or about March 6, 1946, at Los Angeles, California, co-conspirator Dorothy McClain presented for payment to the Goodwin Shoe Store [11] the United States Treasury check described above in this count.

A True Bill

RAY H. MORSE

Foreman

JAMES M. CARTER

United States Attorney

[Endorsed]: Filed Nov. 20, 1946. [12]

[Minutes: Monday, December 2, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for arraignment and plea of defendant Herman Hayman; R. H. Kinnison, Assistant U. S. Attorney, appearing as counsel for the Government; Anthony Entenza, Esq., appearing as counsel for the said defendant, who is present on bond:

The defendant states his true name is Herman Robert Hayman, and being informed that he is entitled to a jury trial and to be represented by counsel, and his attorney having waived reading of the Indictment, the defendant pleads not guilty to each of the six counts.

It is ordered that the cause is hereby set for trial before Judge Mathes January 7, 1947, at 10 A. M. [13]

[Minutes: Tuesday, January 7, 1947]

Present: The Honorable William C. Mathes, District Judge.

This cause coming on for trial of the defendant Herman Robert Hayman; Wm. L. Ritzi, Esq., Asst. U. S. Attorney, appearing for the Government; Anthony Entenza, Esq., appearing for the defendant; the defendant being present on bond. Jury waiver is signed and filed.

Attorney Ritzi makes opening statement for the Government.

Samuel T. Thompson, Charles A. Wilbun, Juanita Jackson and Dorothy McClain are respectively called, sworn, and testify for the Government.

U. S. Exhibits 1 and 5 are admitted into evidence and 2, 3, and 4 are marked for identification.

Court recesses to 1:30 P. M. Court reconvenes at 1:40 P. M.; all present as before. Witness Dorothy McClain resumes the stand and testifies further. The witness is excused.

Paul Chester Redd III is called, sworn, and testifies for the Government. U. S. Exhibit No. 6 is admitted into evidence.

Jackson H. Martin is called, sworn, and testifies for the Government. U. S. Exhibit 4 for identification is admitted into evidence.

S. Kendall Gibson is called, sworn, and testifies for the Government. U. S. Exhibits 2 and 3 for identification are admitted into evidence.

John S. Wells is called, sworn, and testifies for the Government. At 3:15 the Government rests. [15]

Herman Robert Hayman is called, sworn, and testifies in his own behalf. The defendant rests.

S. Kendall Gibson is recalled and testifies further for the Government. The Government rests. Argument is waived.

The Court finds the defendant guilty as charged in counts 1, 2, 3, 4, 5 and 6. The defendant is remanded to custody of the U. S. Marshal. It is ordered that this cause be, and it hereby is, referred to the Probation Officer for investigation and report and continued to January 20, 1947, at 1:30 P. M., for hearing and sentence. The Probation Officer's report is to be in the hands of the clerk preceding sentence. [16]

[Minutes: Monday, January 20, 1947]

Present: The Honorable William C. Mathes, District Judge.

This cause coming on for hearing report of the Probation Officer and for sentence of defendant Herman Hayman on the six counts of the Indictment; Wm. L. Ritzi, Assistant U. S. Attorney, appearing as counsel for the Government; A. P. Entenza, Esq., appearing as counsel for the said defendant, who is present in custody:

Attorney Ritzi recommends a penitentiary sentence.

The Court pronounces sentence upon the defendant and fines him as follows:

* * * * * [17]

District Court of the United States
Southern District of California, Central Division
No. 19036

Criminal indictment in six counts for violation of
U. S. C., Title 18, Secs. 78, 73 and 88

UNITED STATES

v.

HERMAN HAYMAN

JUDGMENT AND COMMITMENT

On this 20th day of January, 1947, came the United States Attorney, and the defendant Herman Hayman appearing in proper person, and with his counsel, A. P. Entenza, and,

The defendant having been convicted on trial by the court without a jury, jury trial having been waived, of

the offenses charged in the indictment in the above-entitled cause, to wit: that on or about March 26, 1946 at Los Angeles, California, he did falsely personate the holder of a debt due from the United States and did under such false personation receive the money due, and did forge and counterfeit the endorsements and signatures of the payees of Treasury checks of the United States and obtain the sums of money represented by said checks, and did utter and publish Treasury check No. 213,767, and did conspire to defraud the United States; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of ten years in an institution to be selected by the Attorney General of the United States, and pay to the United States a fine of \$2,000 for the offense charged in Count One of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$2,000 for the offense charged in Count Two of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$2,000 for the offense charged in Count Three of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$2,000 for the offense charged in Count Four of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$2,000 for the offense charged in Count Five of the indictment.

It Is Further Ordered and Adjudged that the ten-year periods of imprisonment imposed under Count One and Count Two of the indictment shall run Consecutively, and that the ten-year periods of imprisonment imposed under Counts Three, Four and Five of the indictment shall all commence and run concurrently with the ten-year period of imprisonment imposed under Count Two of the indictment, so that the total period of imprisonment shall be twenty years.

It Is Further Ordered that the defendant pay to the United States a fine of \$10,000 for the offense charged in Count Six of the indictment, and that payment of a total fine of \$10,000 shall fully satisfy all fines imposed under Counts One to Six inclusive of the indictment.

It Is Further Ordered that the defendant be further imprisoned until the fine of \$10,000 is paid or he is discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WM. C. MATHES

United States District Judge

The Court recommends commitment to

Filed

A True Copy. Certified this 20th day of January, 1947.

(Signed) EDMUND L. SMITH

Clerk,

(By) Louis J. Somers

Deputy Clerk [18]

[Minutes: Tuesday, February 18, 1947]

Present: The Honorable William C. Mathes, District Judge.

This cause coming on for correction of judgment and sentence of defendant Herman Hayman; R. H. Kinnison, Assistant U. S. Attorney, appearing as counsel for the Government; Walter L. Gordon, Jr., Esq., by E. S. Ragland, Esq., appearing as counsel for the said defendant, who is present in custody:

The Court imposes judgment as follows and orders that the same be entered nunc pro tunc as of January 20, 1947:

* * * * * [20]

District Court of the United States
Southern District of California, Central Division
No. 19036

Criminal indictment in six counts for violation of
U. S. C., Title 18, Secs. 78, 73 and 88

UNITED STATES

v.

HERMAN HAYMAN

JUDGMENT AND COMMITMENT

(Corrected pursuant to Rule 35)

On this 18th day of February, 1947, came the United States Attorney, and the defendant Herman Hayman appearing in proper person, and with his counsel, Walter L. Gordon, Jr. and E. S. Ragland, and,

The defendant having been convicted on trial by the court without a jury, jury trial having been waived, of the offenses charged in the indictment in the above-entitled cause, to wit: that on or about March 26, 1946 at Los Angeles, California, he did falsely personate the holder of a debt due from the United States and did under such false personation receive the money due, and did forge and counterfeit the endorsements and signatures of the payees of Treasury checks of the United States and obtain the sums of money represented by said checks, and did utter and publish Treasury check No. 213,767, and did conspire to defraud the United States; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of ten years in an institution to be selected by the Attorney General of the United States or his authorized representative, and pay to the United States a fine of \$2,000 for the offense charged in Count One of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in Count Two of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in Count Three of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in Count Four of the

indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in Count Five of the indictment.

It Is Further Ordered and Adjudged that the ten-year periods of imprisonment imposed under Count One and Count Two of the indictment shall run Consecutively, and that the ten-year periods of imprisonment imposed under Counts Three, Four and Five of the indictment shall all commence and run concurrently with the ten-year period of imprisonment imposed under Count Two of the indictment, so that the total period of imprisonment shall be twenty years.

It is Further Ordered that the defendant pay to the United States a fine of \$10,000 for the offense charged in Count Six of the indictment, and that payment of a total fine of \$10,000 shall fully satisfy all fines imposed under Counts One to Six inclusive of the indictment.

It Is Further Ordered that the defendant be further imprisoned until the fine of \$10,000 is paid or he is otherwise discharged as provided by law.

It Is Further Ordered that this corrected sentence shall supersede the sentence imposed January 20, 1947; that this judgment shall be entered nunc pro tunc as of January 20, 1947; and that all sentences herein imposed shall commence and run from January 20, 1947.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WM. C. MATHES

United States District Judge

The Court recommends commitment to

Filed

A True Copy. Certified this 18th day of February,
1947.

(Signed) EDMUND L. SMITH

Clerk,

(By) Louis J. Somers

Deputy Clerk [21]

[Title of District Court and Cause]

NOTICE OF APPEAL

Offense: Forgery

Date of Judgment: January 20, 1947

Judgment: Twenty years in prison

Confined: Los Angeles County Jail

The above named appellant hereby appeals to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from the judgment above mentioned on the grounds set forth below:

HERMAN HAYMAN

Appellant

WALTER L. GORDON, JR.

Attorney for Appellant

Grounds of Appeal:

I.

Insufficiency of the evidence to justify the judgment of conviction. [22]

II.

The defendant did not have a fair trial.

III.

That defendant was not represented by counsel.

[Endorsed]: Filed Jan. 27, 1947. [23]

[Title of District Court and Cause]

STATEMENT OF POINTS

The appellant states that the points upon which he intends to rely on the appeal in this action are as follows:

1. The evidence is insufficient to support the judgment of conviction.
2. That the judgment is contrary to law.
3. That several of the counts were necessarily included offenses of the other.
4. The court erred in its decisions of matters of questions of law arising during the course of the trial.
5. The court erred in the admission of evidence.
6. The appellant was not properly represented by counsel.

WALTER L. GORDON, JR.

Attorney for Defendant [28]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 25, 1947. [29]

[U. S. EXHIBIT NO. 1]

CIVILIAN PERSONAL IDENTIFICATION CARD



Bernice Brooks
Name
3805 S. San Pedro St
Home Address
Los Angeles 411 Calif
City State
High
Place of Birth Phone
If Native Born, When and Where

SUBSCRIBED AND SWORN BEFORE ME
THIS *22nd* DAY OF *June* 19*44*
MY COMMISSION EXPIRES *NOV 19 1944*
NOTARY PUBLIC

DATE OF IDENTIFICATION					
AGE	HEIGHT	WEIGHT	H.	EYES	DATE BIRTH
<i>23</i>	<i>5'6"</i>	<i>123</i>	<i>B.</i>	<i>B.</i>	<i>1/12/23</i>

Section 529 of the Penal Code of California prohibits the use of this card by any person other than the one named herein and whose picture appears hereon.

Bernice Brooks
Signature of Card Bearer
3300 Vernon
Employed By
Macy's
Address
Social Security No. *34-72-6819*
No. California License
Citizenship Status *Am. Negro.*

RIGHT INDEX PRINT



Case No. 19036. U. S. vs. Hayman. U. S. Exhibit No. 1. Date 1/7/47. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [31]

AR
ANCE

CAMP BEALE, CALIF.

5-521-68

351, 100

Treasurer of the United States

15-51
000

EB 28 1946

PAY

*****282 DOLLARS AND .50 CTS

*****282.50

1ST. LT. CHARL. A. WILBUN

1615 E. 47TH. ST.,
LOS ANGELES, CALIF.

YOU NO
45392



ORIG FMT ON VOU 21501-1 JAN 46 ACCTS

213,767

KNOW YOUR ENDORSER-REQUIRE IDENTIFICATION

AR
ANCE

CAMP BEALE, CALIF.

5-521-68

351, 100

Treasurer of the United States

15-51
000

EB 28 1946

PAY

*****282 DOLLARS AND .50 CTS

*****282.50

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LOS ANGELES, CALIF.

YOU NO
45392



ORIG FMT ON VOU 21501-1 JAN 46 ACCTS

213,767

KNOW YOUR ENDORSER-REQUIRE IDENTIFICATION

[U. S. EXHIBIT NO. 4]

United States



of America

General Accounting Office

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting Act, 1921 (42 Stat. 24, 25; 31 U. S. C. 46, 52 (e)), and to 4 CFR 101-11.6 (a), I hereby certify that the annexed document, numbered W-27, is a

copy of the official document now on file in the General Accounting Office in the following case:

Samuel T. Thompson

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 19th day of December in the year 1946 at Washington.

By direction of the Comptroller General of the United States,

W. Martin
Chief Clerk.

General Accounting Office.



2.11

[34]

[35]

WAR
FINANCE

FORT MACARTHUR, CALIF.,

W-27

728, 823



Treasurer of the United States

15-51
000

PAY

One Hundred

Dollars **\$100**⁰⁰/₁₀₀

TO THE
ORDER OF

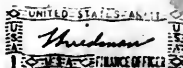
SAMUEL T THOMPSON

39723941 80T

24 MARCH 1946

No. 8515

1931 W 26 ST
LOS ANGELES CALIF



ISSUED BY WHICH DRAWER
PAYING OUT
PAY

KNOW YOUR ENDORSER—REQUIRE IDENTIFICATION

213,967

73-m

2-7-520

RECEIVED PAYMENT FROM
TREASURER OF THE UNITED STATES
MAB 28 46
LOS ANGELES BRANCH
FEDERAL RESERVE BANK
OF SAN FRANCISCO

Samuel T. Thompson
1931 W. 26 St.
Los Angeles, Calif.

IDENTIFICATION PROCEDURE
When cashing this check for the lady's usual
payee, you should require full identification
and endorsement in full presence of Plaintiff.
Refusal to comply with above procedure shall
be cause for refusal to cash.
Please: this check is presented for payment
within one year beginning July 1, next, after date
of issue (U. S. Code, Title 31, Section 725a). It
should be sent by the owner direct to the Secretary
of the Treasury with request for payment after
settlement of account.
The payee should **sign** the back in ink or
indelible pencil.
If the endorsement is made by mark (X) it
must be witnessed by two persons who can write,
giving their places of residence in full.

[U. S. EXHIBIT NO. 5]

SHOES INC. IMPORTERS
 6355 Hollywood Boulevard
 Hollywood, California
 Hillside 9801

GRanite 3193

OLD NAME _____ NEW _____ DATE 3/1/46 194 _____

ADDRESS Woburn - Char - A.
1615 E. 47th St.

PHONE NONE. CITY _____

Salesman	Amount Received	Delivery	Charge	C.O.D.	On A/C
<u>Wob</u>	<u>1405</u>				

Quan.	DESCRIPTION	Code	Amount
	<u>1405 100</u>		<u>13 50</u>

III S. EXHIBIT NO. 6]

WAR
FINANCE



O. 114

R WHICH DRAW

[U. S. EXHIBIT NO. 5]

FRANKLIN
INC.
SHOES
IMPORTERS
6355 Hollywood Boulevard
Hollywood, California
Hillside 9801

GRanite 3193

OLD NAME _____ NEW _____ DATE 3/1/46 194 _____

ADDRESS Woburn - Char. A.
1615 E. 47th St.

PHONE none CITY _____

Salesman	Amount Received	Delivery	Charge	C.O.D.	On A/C
<u>Hub</u>	<u>42.50</u>				

Quan.	DESCRIPTION	Code	Amount
<u>1405</u>	<u>100</u>		<u>13.50</u>
<u>101</u>	<u>100</u>		<u>13.50</u>
<u>2101</u>	<u>100</u>		<u>10.00</u>
<u>Slippers</u>			<u>4.95</u>
<u>101</u>	<u>90</u>		<u>13.50</u>
			<u>55.45</u>
	<u>22X</u>		<u>13.80</u>
			<u>56.83</u>

42312

Case No. 19036. U. S. vs. Hayman. U. S. Exhibit No. 5. Date 1/7/47. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [36]

323,544

Treasurer of the United States

15.51

PAY

Page 12, SIMILAR TO CEC S

5 7 (

TO THE
ORDER OF

No. 11

TO A HIGH DEGREE

ILLINOIS STREET
T 5-1111
LIES, O LINDENHART

KNOW YOUR ENDORSER—REQUIRE IDENTIFICATION

211,161

Other studies have shown that the use of a single end point may be misleading.

I enclose this check in full payment of my subscription to the Journal of the American Veterinary Medical Association for one year commencing July 1, next, after date of issue (Vol. 8, Col. Tit. 3), Section 72(a). It should please send me direct to the Secretary of the Treasury with request for payment after settlement of account.

The name should endorse below in ink at

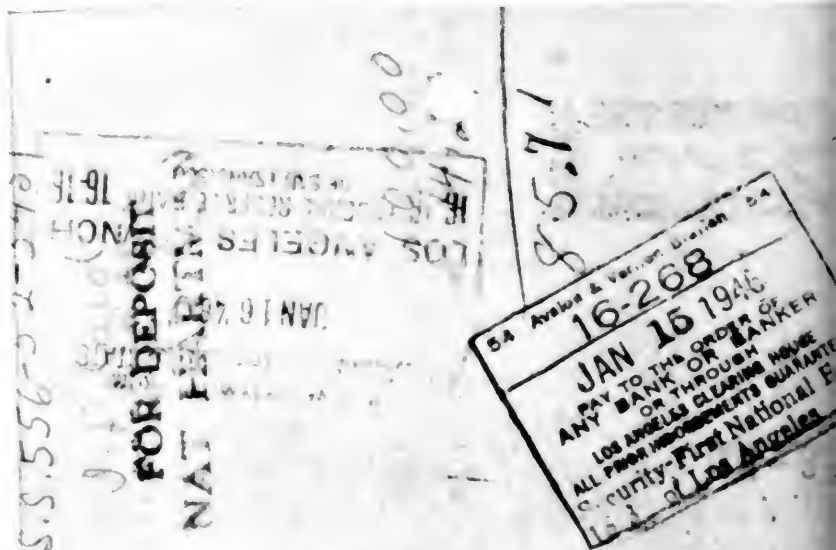
... the ... is made by mark (X) it ...
... by the persons who ...
... was of residence in ...

William J. Weaver
1781 E. 50th Street.

99

ANY BANK
NO GOOD LOS
PAID TO THE





614,274

JAN-8

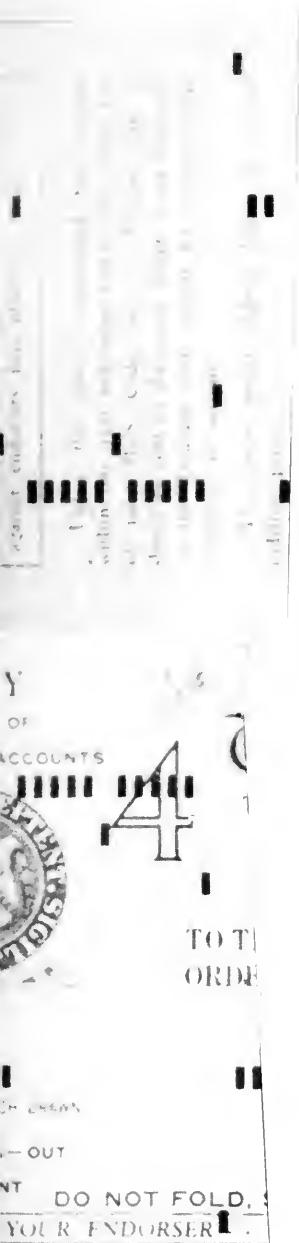
\$100⁰⁰/₁₀₀YOU NO
20457

UNITED STATES

W & V

U.S.A. FINANCE CO.

213,767



Case No. 19036. U. S. vs. Hayman. U. S. Exhibit No. 6. Date 1/7/47. No. 6 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [39]

1891

6.8.554-52-3467

1997

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W. F. F. F.

001.00

45
64 Avenue & 1st St. U.S. Bank
16-268
JAN 15 1945
PAY TO THE ORDER OF
ANY BANK OR BANKER
LOS ANGELES BRANCH
ALL OTHERS UNDESIRABLE
Security: First National
City of Los Angeles

NAME: _____ HFAL: _____ ALIF: _____

t. 14, 27

Treasurer of the United States

JAN -

One Hundred _____

Dollars **\$100**

— 27 — 1927

YOU NO
20457

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UNITED STATES
U
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W E V
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3.1.1. EP 2.3.2. OF IDENTIFICATION

213,76

NAVY
BU OF
ACCOUNTS



ING - OUT

DO NOT FOLD SPINDLE OR MUTILATE
YOUR ENTERPRISE LIKE IDENTIFICATION

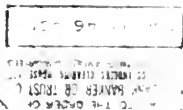
CLEVELAND OHIO 4 5 - EV
Treasurer of the United States
THROUGH FEDERAL RESERVE BANK OF CLEVELAND

Pay ONE HUNDRED dollars
TO THE
ORDER OF -

\$100.00 PAID

26 MAR 46

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780



SUPER LIQUOR STORES

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 39 inclusive contain full, true and correct copies of Indictment; Minute Order Entered December 6, 1946; Waiver of Jury; Minute Orders Entered January 7, 1947 and January 20, 1947; Judgment and Commitment; Substitution of Attorneys; Corrected Judgment and Commitment; Notice of Appeal; Election Not to Begin Service of Sentence; Designation of Contents of Record on Appeal; Statement of Points; Appellee's Designation of Contents of Record on Appeal; U. S. Exhibits 1, 2, 4, 5 and 6 which, together with Original U. S. Exhibit 3 and Copy of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$14.15 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 5 day of March, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, January 7, 1947

Appearances:

For the Plaintiff: James M. Carter, Esq., United States Attorney; by William Ritzi, Esq., Asst. United States Attorney.

For the Defendant: Anthony Entenza, Esq.

Los Angeles, California, Tuesday, January 7, 1947,
10:00 A. M.

(Case called by the clerk.)

The Court: Are both sides ready?

Mr. Ritzi: Yes; the Government is ready.

Mr. Entenza: The defendant is ready, your Honor.

The Court: Very well; proceed.

Mr. Ritzi: If the court please, if I may make a brief opening statement?

The Court: You may.

Mr. Ritzi: On November the 20th of this year the grand jury returned a six-count indictment against the defendant Hayman. If I may briefly review the charges that are contained in the indictment, in substance they are as follows:

Count 1 of the indictment, the court will notice, charges a personation; that is to say, that the defendant, in March of this year, falsely personated the true and lawful holder of a Government obligation: that is to say, a Treasury check in the sum of \$100.00.

Count 2 of the indictment charges the forging or the causing to be forged of a material fact, the thing in that particular check which I think the evidence will show to be the signature.

Count 3 of the indictment charges the uttering of that particular check; in other words, after the payee's name was [2*] forged to the check the check was uttered by the defendant.

Count 4 of the indictment charges another forgery count; that is to say, that the defendant, at Los Angeles, on or about March 6th, caused to be forged the payee's signature of a check that was in the sum of \$282.50.

The Court: Now, the first three counts refer to a single check?

Mr. Ritzi: That is correct, your Honor.

The Court: And the fourth count is a different check?

Mr. Ritzi: Is a new check.

And the count 5 charges the uttering of the check that is contained in count 4; and count 6 of the indictment is a conspiracy which charges in effect that the defendant, together with another, Dorothy McClain, conspired, forged and passed the check contained in counts 4 and 5.

The Government expects to call approximately nine witnesses. The Government will call the two payees of those two checks, who will testify that they did not authorize any one to sign their names to the checks, nor did they themselves sign their names to the checks.

*Page number appearing at top of page of original Reporter's Transcript.

The Government will call one Juanita Jackson, who will testify that she and defendant went around town, driving around in his automobile, and stole various letters from mailboxes in town and thereafter forged the payees' names and went around and cashed the checks. Dorothy McClain is [3] here, and she is at the present time serving time at Tehachapi, which the Government is very frank to admit, but she will testify that she and the defendant also stole checks and forged the payees' names and cashed those particular checks.

Mr. Paul Redd is here, who will testify that, at the defendant's instances, he forged and cashed some of the checks for the defendant.

Mr. Jackson Martin is here. He is the operator of a store out on South San Pedro Street and he will testify that the defendant came to his store and cashed the \$100.00 check mentioned in the first three counts of the indictment, and state that he was the payee.

In addition to that, Mr. Kendall Gibson and Mr. Willis Jacks, who were the manager or managers of a shoe company out in Hollywood, will testify that the defendant and another came to his store and cashed another one of the checks. And then, of course, we have agents of the Secret Service who will testify concerning their investigation of this particular case.

That, in brief, is what the Government expects to prove and will endeavor to show in this particular case.

Mr. Entenza: No statement.

The Court: Very well; call your first witness.

Mr. Ritzi: Mr. Samuel T. Thompson. [4]

SAMUEL T. THOMPSON,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Samuel T. Thompson.

Direct Examination

By Mr. Ritzi:

Q. Mr. Thompson, did you ever reside at 1931 West Twenty-sixth Street? A. Yes; I did.

Q. Were you previously in the Army?

A. Yes; I was.

Q. When were you discharged from the Army?

A. February the 24th, 1946.

Q. 1946. Do you know whether or not the Government owed you a check for mustering-out pay?

A. It did.

Q. Do you know the amount of that mustering-out pay? A. Yes, sir; it was \$100.00.

Q. \$100.00. I show you—

Mr. Entenza: No objection. I have seen it.

Q. By Mr. Ritzi: I show you a check made out to "Samuel T. Thompson, 1931 W. 26 St." in the sum of \$100.00; and, if you will turn the check over and look at the endorse- [5] ment on the rear, the name "Samuel T. Thompson"? Will you tell the court whether or not that is your signature? A. That is not my signature.

Q. It is your name? A. That is my name.

Q. But it is not your signature? A. No, sir.

Q. Did you authorize anyone to sign that particular check for you? A. No; I did not.

(Testimony of Samuel T. Thompson)

Q. Did you ever receive the proceeds on that check?

A. No; I did not.

Mr. Ritzi: That is all.

Mr. Entenza: Just a minute.

Cross Examination

By Mr. Entenza:

Q. Do you know whose signature happens to be on the back of the check?

A. That is my name but not my signature.

Q. That is your name but not your signature?

A. That is right.

Q. You say it is not. When did you receive the check?

A. I did not receive that check.

Q. Did you receive checks of a like amount before? [6]

A. Yes; I received two checks.

Q. Two checks in the same amount, \$100.00?

A. That same amount; yes.

Q. Where was this check supposed to have been received?
A. At 1931 West 26th Street.

Q. Was that the place of your residence?

A. At that time; yes.

Q. Do you happen to know the defendant, Mr. Hayman?
A. I do not.

Q. Have you ever met the defendant before?

A. I have never seen him that I know of.

Q. As far as you are informed and know, you don't know whether or not he signed the check?

A. I do not know who signed it. No; I do not.

Mr. Entenza: That is all.

Mr. Ritzi: That is all.

The Court: You may step down.

Mr. Ritzi: Mr. Charles A. Wilbun.

CHARLES A. WILBUN,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Charles A. Wilbun.

The Clerk: Spell your last name, please. [7]

The Witness: W-i-l-b-u-n.

Direct Examination

By Mr. Ritzi:

Q. Mr. Wilbun, did you ever reside at 1615 East 47th Street in Los Angeles or receive mail there?

A. I did.

Q. You received your mail there? A. I did.

Q. Were you an officer in the United States Army?

A. I was.

Q. What was your rank in the Army?

A. First lieutenant.

Q. First lieutenant. When were you discharged from the Army?

A. My terminal leave was ended on April 17th of 1946.

Q. Did the Government owe you a sum for mustering-out pay, do you know, or some sum?

A. For terminal leave pay for one month I was owed \$282.50 for one month, \$286.00 for another month, and \$300.00 and some for another month.

Q. Now I show you a photostat of a Treasury check made out to "1st Lt. Charles A. Wilbun, 1615 E. 47th St., Los Angeles, Calif." in the sum of \$282.50. I will ask you to observe the endorsement on the rear of the check and tell [8] me whether or not that endorsement is yours.

A. This endorsement is not my signature. It is my name.

(Testimony of Charles A. Wilbun)

Q. Did you authorize anyone to receive that check for you? A. I did not.

Q. Did you authorize anyone to sign your name to the rear of the check? A. I did not.

Q. Did you receive the proceeds on that particular check? A. I did not.

Mr. Ritzi: That is all.

Cross Examination

By Mr. Entenza:

Q. Do you know the defendant? A. I do not.

Q. Did you ever see the defendant?

A. I did not.

Q. You have never met before?

A. I never have.

Q. I believe I was confused in your name. What was it, please? A. Charles A. Wilbun, W-i-l-b-u-n. [9]

Q. You reside where, did you say?

A. At that time I lived at 1615, 1615 East 47th Street.

Q. And this check was supposed to have been received at that address? A. At that address; that is correct.

Q. You do not know who endorsed the check, do you?

A. I do not.

Mr. Entenza: That is all.

Mr. Ritzi: That is all. Juanita Jackson.

JUANITA JACKSON,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Juanita Jackson.

Direct Examination

By Mr. Ritzi:

Q. Is that Miss or Mrs? A. Mrs.

Q. Mrs. Jackson. Do you know the defendant, Herman Hayman? A. Yes; I do.

Q. Is that the defendant sitting across from me?

A. Yes. [10]

Q. How long have you know him?

A. For about seven years I would say.

Q. Seven years. Where did you first meet him?

A. At high school, or maybe a little before at high school.

Q. Which high school was that?

A. Jefferson High School.

Q. Do you know what kind of an automobile the defendant had in 1945 and 1946?

A. Well, previous to the car he has now, I think he had a Mercury, or a little bit older than the car he has now, a Mercury, I think.

Q. What kind of an automobile does he have now, by the way?

A. Two months ago, the last time I saw him, he had a '42 Buick convertible.

Q. Did you and the defendant ever go around in either that Mercury or the Buick Automobile and steal mail from letter boxes? A. Yes; we did.

(Testimony of Juanita Jackson)

Mr. Entenza: Pardon me, counsel. Might I have an answer to that question again?

The Witness: Yes; we did.

Mr. Entenza: Yes; you did?

The Witness: Yes. [11]

Mr. Ritzi: What was the mode of operation for getting these letters from the mail boxes, or checks or whatever they were? Will you tell the court?

A. Well, the defendant and I would ride around in the defendant's car, and several times he would stop and maybe point out the letter to me or the check—mostly, I mean, it was a check—and I would get out myself and get it.

Q. Did the defendant ever get out of the car?

A. Very seldom. He has at different times, but very seldom did he get out because—no; he didn't.

Q. What would he do? Would he stop in front of the house or what? How was that done?

A. Well, he would stop, maybe in front of the house, or maybe a little bit down from the house so that he would not be seen.

Q. Would he go up and ring the bell first, or how did he know if anyone was home?

A. I don't know he knew anyone was home or not, but he usually just kind of knew sort of.

Q. How did he know what type of envelope to take?

A. Somehow or another. He told me that they would be in the brown envelope. I didn't know.

Q. Did it happen occasionally or did it happen frequently or once or twice or what? Do you know?

A. Well, more than once or twice. [12]

(Testimony of Juanita Jackson)

Q. Would you say it happened occasionally or frequently? A. Occasionally.

Q. Occasionally. After you obtained these checks or the defendant obtained them did you or the defendant put the payee's name on the back of the check?

A. Well, the defendant didn't, but at times I did.

Q. You did? A. Yes.

Q. And just what would you do with the check?

A. Well, I would take the check to wherever the defendant saw fit that I should take it, and I would sign it and cash it, and the proceeds were turned over to the defendant and split up as he saw fit.

Q. Well, what did he do; did he give you a part of the proceeds? A. A part of the proceeds; yes.

Q. Of the check. And did the defendant himself have some sort of identification cards to assist you in cashing these checks?

A. There were cards obtained—I don't know—from some place, but he did. He had identification.

Q. He did have identification? A. Yes; he did.

Q. Did the defendant state to you where he obtained those identification cards? [13]

A. I understand that they were printed at some office somewhere downtown. I don't just know where.

Q. Did the defendant ever state to you how many of these identification cards he had? A. Yes; he did.

Q. How many? A. 700.

Q. He said that he had 700 of them printed up?

A. Yes.

Mr. Entenza: Will you let me see that card, counsel?

Mr. Ritzi: Yes.

(Testimony of Juanita Jackson)

Q. Now, I show you an identification card made out to "Bernice Brooks" and will ask you is this the type of card that the defendant obtained or had?

A. Yes; that is the type.

Q. I see. However, was this made out to you? Not this particular card that I showed you, but the cards of the similar nature?

A. No. They were blank and the name was filled in. They were all blank cards.

Q. I see. You filled the name in or who filled the name in?

A. Well, I usually filled the name in, made out the cards.

Q. Who gave you the cards? [14]

A. The defendant.

Q. The defendant gave you the cards. How many checks, if you know, approximately how many checks did the defendant give you to cash or place the payees' names thereon? Do you know offhand?

A. I don't know just how many, but quite a few over a period of time.

Q. Over what period of time?

A. When the defendant brought the checks to me.

Q. When was it, from when to when, approximately, if you know?

A. Approximately a year, I would say.

Q. Would you say there were five checks or 50 checks or a hundred checks or how many, approximately, if you know?

A. Well, there was quite a few of them. I don't know. Maybe there was 50, I will say, but there was quite a few

(Testimony of Juanita Jackson)

that came in, take them in bunches or at different times. There was quite a few.

Q. On each of these checks would the defendant have you put the payee's name thereon?

A. Well, not—well, let's see. Well, yes.

Q. Well, did any of the checks ever come to you already endorsed in the payee's name? A. No, no.

Q. They did not. And then, thereafter, would the [15] defendant drive you to the various places about town to cash those checks? A. Yes; he would.

Q. What kind of stores were they principally, if you know?

A. Usually liquor stores, and very seldom check-cashing agencies and frequently men's stores.

Q. By the way, how did you obtain the picture? You said, if I understand you correctly, that he gave you a number of these little cards. Was your picture placed on those cards? A. Yes; it was.

Q. How was that picture obtained?

A. Snapshots of my own, my own picture.

Q. Did you ever use anything else other than these little identification cards? A. Well, yes.

Q. What were they?

A. They are cards of identification, and frequently—very seldom a driver's license.

Q. Wait a minute, now. Was it frequently or very seldom?

A. Well, I mean not much. I mean not many times, but there was a driver's license used.

(Testimony of Juanita Jackson)

Q. Was the driver's license made out in your own name [16] or in the name of the payee?

A. In the name of the payee.

Q. How did you get those driver's licenses?

A. Well, the defendant took me to the motor vehicle place downtown here.

Mr. Ritzi: I think that is all, your Honor.

Mr. Entenza: Just a minute, Mrs. Jackson.

Cross Examination

By Mr. Entenza:

Q. How many drivers' licenses did you have?

A. You mean of my own driver's license?

Q. Yes.

A. Well, at that time I didn't have any. I have a driver's license now.

Q. Is that the one that he assisted you in getting?

A. No; not my driver's license.

Q. You said something about the vehicle department, is that right? Did you go to that department to get a license?

A. Yes; the defendant took me there for the purpose of checks, but my driver's license didn't have anything to do with that.

Q. You did not get your license at that time. You had a license either before or since that time? [17]

A. Since then.

Q. Your acquaintance with the defendant over a period of seven years, was it an acquaintance of courtship? Did

you both go with one another socially? Were you married at that time?

A. I have been married for three years, and I knew Herman through high school. There is no personal relations whatsoever, just friendship and, most likely, business acquaintance.

Q. You and he went to school, then, together at that time?

A. Yes; we went to school. We graduated from the same class in the summer of '41.

Q. When did you first have this check expedition—

A. About a year ago.

Q. —to these mail boxes?

A. About a year ago.

Q. About a year ago? A. Yes.

Q. You say last January or last March or some date?

A. Oh, last Christmas. Oh, January or February, last year.

Q. Around the Christmas holidays and immediately following, is that right? A. Yes. [18]

Q. Do you remember the first trip that you made?

A. No; I do not.

Q. Do you remember whether or not the first trip was in an automobile and the robbery of some mail from a house? A. I don't understand what you mean.

Q. Well, the first trip that you made with Mr. Hayman wherein you received some checks, do you recall when that was? A. No; I don't.

Q. Do you remember what part of the city you happened to be in?

A. No; I don't. I don't remember just when the first was. I don't.

(Testimony of Juanita Jackson)

Q. Where did you meet Mr. Hayman upon those occasions in order to make the trip?

A. Well, I never met him at his home. He usually came to mine.

Q. He came to your home? A. Yes.

Q. Would he go in your home, toot the horn, or would you have a pre-arranged time to go out and meet him in the car?

A. Depends on how the defendant felt. Sometimes he honked the horn, sometimes he came in, just how he felt.

Q. Was this generally in the daytime? [19]

A. Well, not generally in the daytime.

Q. Was it in the nighttime?

A. At different times he would come.

Q. Both day and night?

A. Both day and night.

Q. In the morning on some occasions?

A. Most likely in the mornings. I mean, you know, more so in the mornings.

Q. About what time, between 8:00 o'clock and 12:00?

A. There was no definite time.

Q. There was no special time?

A. No; but sometime in the morning.

Q. You met him in the morning, sometimes in the afternoon and sometimes in the evening?

A. Yes.

Q. On those occasions, Mr. Hayman, the defendant in this case, would drive you out and point out to you a mail box?

A. He didn't come by my house all the time to point out the mail boxes. He came by to bring checks at differ-

(Testimony of Juanita Jackson)

ent times. That is why I say he came at all times of the day. In the morning, if he was coming to my home for mail, to look for the mail, it would be in the mornings; but at night he brought mail to my house.

Q. Oh, he did bring some mail to you at your home? [20] A. Yes; he has.

Q. In that instance he would come in the home and distribute the mail to you, is that right, or place it in your hands? A. Well, yes.

Q. Anyone else present at that time?

A. Yes; sometimes someone else was present.

Q. Would you mind giving the names? A. Yes.

Q. Of those persons?

A. I don't think that—not that I can't, but I don't think that has much to do with it, because I received it myself and he did give it to me. But I don't mind, no; my husband.

Q. I really do not want you to expose your husband.

A. Well, that is all right. I don't mind. I don't mind.

Q. I thought possibly there was some of the other girls who are to testify present.

A. Well, yes; there is a girl here in the courtroom now who has been with me.

Q. You heard the attorney for the Government call out the names of the witnesses whom he intended to have present today? A. Yes. [21]

Q. I would ask you now whether or not they were present in your home when the distribution of this mail took place on the part of the defendant Hayman?

A. Yes; at several times.

(Testimony of Juanita Jackson)

Q. Sometimes the other girls were there in your home?

A. Yes, yes.

The Court: Suppose you name them.

Mr. Entenza: Pardon me?

The Court: Suppose you name them and we can be definite about it.

Mr. Entenza: All right; I will.

Q. We would like to have you name them.

A. Dorothy McClain.

Q. Dorothy McClain was one?

A. Well, that is just about all.

Q. That is about all? A. Yes.

Q. Now, we are making this little pleasure tour around the city on one of these occasions, morning, afternoon or evening; do you recall whether or not you drove some distance from your home? A. Well—

Q. I would say "distance" would be Beverly Hills?

A. No.

Q. Hollywood? [22] A. No.

Q. North Wilshire Boulevard or any of those districts?

A. Well, they would not be quite out that far, but anywhere that he chose to drive around.

Q. Well, when you say "chose to drive around," then he did not drive directly to the mail that you stole, is that right?

A. No; not direct, but he would drive me around.

Q. He would drive around several blocks and finally point out a place to you? A. Yes.

The Court: I will have to interrupt you at this point, Mr. Entenza.

(Testimony of Juanita Jackson)

Mr. Entenza: Yes, your Honor.

The Court: We will take a recess of five minutes.

(Intermission for other court proceedings.)

Mr. Entenza: May I have the last question and answer?

(Record read by the reporter as requested.)

Q. By Mr. Entenza: Would he tell you to get out of the car or did you get out of the car?

A. Well, he would ask me to get out of the car.

Q. He would ask you to get out of the car?

A. Yes.

Q. And did he tell you what to do or ask you to do something unusual on that occasion or any of those occasions? [23]

A. Well, it was understood when I went out what was supposed to be done.

Q. Let us get down to the facts, Mrs. Jackson.

A. Well, yes. Yes; he told me to get out of the car and go get the check and bring it back to the car.

Q. Did he tell you to go and get a specific check or get the mail?

A. Well, the check that was in the mail box, you know, before the house that he stopped at.

Q. Would you drive by the mail box first? You would not stop right at the mail box, would you, with the car right there?

A. Well, the defendant would never stop right in front of the house; no.

Q. Where would he allow you to alight?

A. After the car was down the street a couple of houses from where the check was.

(Testimony of Juanita Jackson)

Q. He would drive up along the sidewalk, tell you to get out and go to that mail box, pointing out to you the mail box you just passed or a specific mail box?

A. Yes.

Q. Would he tell you what to do when you got to the mail box? A. Yes.

Q. Would he tell you to put your hands in the mail box? [24] A. No, no.

Q. How did you proceed to get the mail out, the check? A. Well, the mail was taken out of the box.

Q. Well, how did you take it out?

A. Well, let me see; just take it out of the box.

Q. Well, was the box open like a basket?

A. Sometimes it was open; sometimes it was.

Q. Was it a large box or those small mail boxes that you have to deposit letters?

A. The boxes were in various sizes; some were open, some were shut, some were small and some were large.

Q. You know what a mail box is, don't you, a United States mail box?

A. Well, I know what a mail box is. I don't know the regulation for the boxes, but I know what a mail box is.

Q. You would recall whether or not they were United States mail boxes, regular catch boxes in green, or the boxes on the tenement houses, the apartment house? They are really United States mail boxes, are they not?

A. Well, they are boxes and it says "mail". I don't know about the United States mail boxes.

(Testimony of Juanita Jackson)

Q. Would you recall whether or not they were made of wood or steel?

A. Some were pliable, that new plastic through which you could see, and sometimes they just had cigar boxes setting [25] up there for mail boxes. All types of mail boxes that people use.

Q. Did you have an instrument with you such as a screw driver? A. No.

Q. Or jimmy? A. No.

Q. Or anything of that kind by which you got the mail out of the box? A. No; nothing but my hands.

Q. Do you know whether or not in the box there was a little door of some kind that pulled down when the mail went in the box?

A. Sometimes. Different kinds of mail boxes.

Q. Now, you say that the defendant stated: "In that box you will find a check"?

Mr. Ritzi: I think that has been asked and answered, your Honor.

Mr. Entenza: I do not think I asked that question, your Honor.

The Court: Overruled. Answer the question.

The Witness: What did you say?

Q. By Mr. Entenza: I think you testified that he pointed out the box and told you to go there and get the check. I now ask you, in making reference to the mail box [26] which had the mail therein, did he say "You reach your hand in and get from that box a certain check"?

A. Well, usually the check was there. You could see it somehow or another. I mean sometimes the boxes were

(Testimony of Juanita Jackson)

open, and, as I say, sometimes the boxes were transparent. And I don't know how he knew it was there but he showed it to me. I don't know how he would know unless just by sight.

Q. You don't know anything about how he knew the checks were there, is that right? A. No.

Q. How long had you been with him that morning?

A. There was no particular morning.

Q. Any one of these particular mornings that you recall, before he drove you directly to the mail box?

A. Well, sometimes he would drive right up on one; the next time he might drive around. It just depends on where it was, if he knew where it was.

Q. Drive around a matter of minutes, would he, sometimes half an hour, sometimes an hour before he got to the mail box? A. Yes.

Q. And then you would get out and get this letter in particular or a lot of letters?

A. Never letters. I mean it was most likely checks.

The Court: By "check" do you mean just the check without [27] anything on it, without any container or anything of that kind?

The Witness: No. I mean the open-faced brown envelope with the green check in it.

The Court: An envelope with a check in it?

The Witness: Yes.

The Court: And that is what you mean when you say "checks"?

The Witness: Yes.

Q. By Mr. Entenza: Would you have some assorted mail or would you just simply see that check and reach in and get it?

(Testimony of Juanita Jackson)

A. Well, I never would take just the mail. I mean I wouldn't bother with the mail, just the check; yes.

Q. You just took the brown check? A. Yes.

Q. Regular Government check? A. Yes.

Q. I am sorry I haven't one of those checks with me. I do not carry one of those. That is one of the envelopes. It was a long, narrow envelope, was it not?

A. Yes.

Q. With a transparency in front? A. Yes.

Q. And underneath that transparency would be the address of the receiver of the check, is that right, do you [28] recall? A. Yes.

Q. Do you remember having received more than one of those checks on one of these occasions out of any particular box? A. No.

Q. Just one check? A. Usually just one.

Q. Did he ever say to you "pick up Mr. Brown's or Mr. Jones's check there"? Did he give you any name by which you would understand that that was the check that you should pick up? A. No.

Q. Then you had the car stop some number of feet or yards away, you got out, went to the mail box and picked this check out? A. Yes.

Q. And he remained in the car, is that right?

A. Yes.

Q. And did he always remain in the car?

A. Not always, but most of the time. The defendant didn't want to be seen or known that he was even there. It was always myself or someone else.

Q. Did he tell you that? A. Yes. [29]

(Testimony of Juanita Jackson)

Q. Or is that a conjecture? Did he say to you that he did not want to be seen?

A. Yes. He says that the woman is less conspicuous going to the mail box than just an ordinary man going up to the mail box.

Q. And you did the mail box robbery yourself?

A. Well, I think I should say this right now: The whole—the checks that were obtained were not always obtained by me taking them out of the boxes. Sometimes they were brought to me in packages.

Q. I am questioning you about going to the mail boxes. I am going to come to the packages in a minute or two.

A. All right. I wanted to just—

Q. This is now about the mail boxes that I am trying to get some answer to. Do you recall how many mail boxes were pointed out to you by the defendant during the period of a year?

A. No; I don't.

Q. In answer to the United States District Attorney's question, I believe you said there were a good many?

A. Yes.

Q. And you then walked back to the automobile after taking the check?

A. Yes. [30]

Q. You did not observe anybody around the mail box at that time, did you?

A. I don't know.

Q. Any persons standing there, any children playing around, anyone in the house, particularly?

A. No.

Q. Watching you take the check?

A. No; I don't guess so. I don't know if they saw me or not. I don't know.

Q. I believe you then stated in answer to a question that you took the check from the mail box and handed it to the defendant in this case, is that right?

A. Yes.

(Testimony of Juanita Jackson)

Q. In the automobile? A. In the automobile.

Q. And who opened the check, as you recall; that is, who tore the envelope open?

A. Sometimes he would, and sometimes I would. It just depended.

Q. You did not know up to that time what the amount would be, did you? A. No.

Q. You would look at the amount of the check?

A. Yes.

Q. And then would he pass that back to you on the [31] occasions where he had torn the envelope open, would he pass the contents, the check itself, to you?

A. Yes; he would.

Q. And then would drive you some other place where you could cash the check, is that right? A. Yes.

Q. Would the cashing of the check take place on the same day that you got the check from the mail box?

A. Not always; sometimes.

Q. Sometimes you carried the check, instead of him, as it were? A. I don't understand what you mean.

Q. Would you have it in your purse?

A. Yes; but usually the defendant kept the check or checks if it was going to be the next day, if it was going to be the next day it was going to be cashed.

Q. Did you have a particular cache or a certain place to hide the checks, between the two of you, rather than on his person or on your person? A. No.

Q. You had no hideaway of any kind?

A. No; no hideaway.

Q. Then on the next day or on that day he would then meet you in front of your house or some other given

(Testimony of Juanita Jackson)

spot and you would drive to a place where you could cash [32] the check? A. Yes.

Q. I think you said liquor stores and other mercantile establishments, and I think you mentioned a shoe store, is that right? A. Yes.

Q. Or did you?

A. No; I didn't mention a shoe store. I said, "men's clothing store."

Q. Men's clothing store. I guess that was in the statement of counsel, where he mentioned something about a shoe store. I believe you said that you kept away from check-cashing establishments, is that right?

A. Yes.

Q. But you did cash checks in some of the check-cashing establishments, did you not? A. Yes; I did.

Q. Will you mention some of the places where you cashed them, if you recall? I am not now talking about the liquor stores. I am talking about check-cashing places.

A. What did you say?

Q. Would you recall some of the places where you cashed the checks in the check-cashing places?

A. Yes; I recall.

Q. Could you recall where they were located? [33]

A. Throughout the city, different places.

Q. Throughout the city at various places. Would one of them be on Broadway? A. Possibly so.

Q. Would one of them be on Hill Street in Subway Terminal Building? A. No.

Q. Would one be in the depot on Sixth Street, the Terminal Building basement? A. No.

(Testimony of Juanita Jackson)

Q. Then, they were out in the outskirts of town, the cashing places where you cashed the checks, is that right?

A. Not all the time.

Q. Sometimes downtown? A. Yes.

Q. But you can't recall which places?

A. I can recall but I don't think it is necessary that I say.

Q. You don't think what?

A. That it is necessary that I say where I did cash them.

Q. Well, it is necessary to answer my questions, my dear lady, unless the court decides that you do not have to answer them. I do not think that that answer is relevant [34] to the question that I asked. Do you remember some places downtown where you cashed checks?

A. Yes; I do remember.

Q. Well, give the names of the places that you recall in that memory.

A. I don't know the names of the places.

Q. Do you know what street they were on?

A. No.

Q. You don't know what block they are in?

A. Well, I couldn't just say.

Q. But you do know that they were downtown; is that a fact? A. Yes; I know that.

Q. You cashed checks on more than one occasion?

A. Yes; I did.

Q. You went to some of those check-cashing places, is that true? Is that right? A. Yes.

(Testimony of Juanita Jackson)

Q. And cashed the check there, and you showed him your identification?

A. Which the defendant gave me, yes, identification card.

Q. Identification card on which appears your photograph, is that right?

A. It wasn't always my photograph. [35]

Q. Well, I think you said in answer to a question of the Government attorney that you had some kodaks taken, is that right?

A. Yes; personal films of my own, just snapshots.

Q. You said snapshots, didn't you?

A. Yes; snapshots.

Q. The snapshot was enlarged and printed upon that card, was it not? A. No; it was not.

Q. How did the picture get on that card?

A. Sometimes I stuck it on there with gum.

Q. Oh, you stuck it on with gum, and that identification was sufficient, is that right? A. Yes.

Q. And the writing on the card was your handwriting, was it? A. Not all the time. Sometimes it was.

Q. Well, was it ever the defendant's handwriting?

A. Sometimes it was.

Q. Can you present a card, or do you know of any card in your possession or in anyone else's possession that bears the signature of the defendant?

A. The cards were destroyed after the checks were cashed.

Q. After each check was cashed? [36] A. Yes.

Q. You destroyed the card? A. Yes.

(Testimony of Juanita Jackson)

Q. And he supplied you with these cards, is that right?

A. Yes; he did.

Q. Did you ever have any one of these cards as a consequence or a result of being employed in governmental service here or in the department stores in the City of Los Angeles or County of Los Angeles?

A. Do you mean was it written on there sometimes where I was employed?

Q. Yes. A. Yes; it was.

Q. You had that kind of a card, did you not?

A. That was the same card.

Q. That was the place of your employment, was it not?

A. Obviously I was not working there at the time. I just used that.

Q. Did you ever work there?

A. At some of the places; yes, that he put down on the card.

Q. You worked at some of those places?

A. Yes.

Q. At any of those places did you have an identification card? [37]

A. When I was terminated at each place the identification cards were turned in to the factory.

Q. You turned them in to the factory at the time you terminated? A. Yes; I did.

Q. But pending your employment, you had that identification card, is that right, while you were employed there?

A. Yes; I did. Yes; sometimes a kind of a card and sometimes they were buttons.

(Testimony of Juanita Jackson)

Q. At that time, either with the button or the identification card, did you cash any of these checks?

A. No; I didn't, not with the companies.

Q. I did not say with the company. I mean at the time of your employment? A. No; I didn't.

Q. Now, when were you employed last?

A. I don't remember the last time.

Q. Do you remember whether or not you were employed during the year 1946 at any time? A. Yes.

Q. And where?

A. Out at the Staber's in Hollywood.

Q. Well, was that domestic work or was that factory work?

A. It was not domestic or factory. I had my own [38] trade, a beauty operator.

Q. You were working for beauticians some place, were you? A. Yes; I was.

Q. And you were under employment and you had an identification card there, did you?

A. No; no identification card.

Q. You just worked at that place? A. Yes, sir.

Q. During your employment at the beauty parlor did you cash any checks then?

A. During my employment, yes.

Q. And the same kind, the same checks that you have described here as being taken from a post office box?

A. Yes.

Q. Or a mail box, rather? A. Yes.

Q. And driven on those occasions, were you, by the defendant, Mr. Hayman? A. Yes; I was.

(Testimony of Juanita Jackson)

Q. And the operation was the same as you have related in relation to the getting of the check and giving it to him in the automobile, he tearing it open sometimes, sometimes you tearing it open, keeping it sometimes all night and cashing it the next day? [39]

A. The defendant kept the checks at night. I didn't keep them at night time.

Q. Who cashed the checks? A. I did.

Q. Did you always cash the checks?

A. Not always.

Q. Did you ever cash a check, checks, of any of these instruments for getting money, whether they were checks or drafts or whatever the instrument was, in the presence of someone else aside from the defendant, Mr. Hayman?

A. Yes; I did.

Q. And did you ever cash the checks alone?

A. Yes.

Q. Many of them? A. Yes.

Q. You cashed a great many of these checks alone, and when you cashed the check, at what period after the cashing of the check did you make a division of the monies with the defendant, Mr. Hayman?

A. The defendant divided the money with me. I gave him the money and he gave me what he saw fit for me to have.

Q. Would that happen when you cashed the checks when you were alone?

A. Well, by "alone" I thought you meant—oh, I beg your pardon. [40]

Q. Without his driving you around or anything?

A. No, no.

(Testimony of Juanita Jackson)

Q. Then, on every occasion that you cashed these checks, you mean the defendant drove you around, is that right? A. Yes.

Q. And he drove you to the place where you cashed the check in every instance, is that right?

A. Yes; he did.

Q. You knew Hayman quite well, didn't you?

A. Yes; I did.

Q. Did you ever know him to be employed?

A. Yes.

Q. Would he stop his employment at the factory or the mill or the place where he was employed to accompany you to cash the checks?

A. Well, he drove me around at the time he was employed. I don't know just how he arranged it.

Q. He drove you around at the time he was employed, is that right? A. Yes.

Q. Do you recall the places where he was employed?

A. One time, the Kirkhill Rubber.

Q. The Kirkhill Rubber Company?

A. Yes. [41]

Q. And you met him in the afternoons and mornings and evenings, sometimes, while he was employed by the rubber company, for the purpose of cashing checks?

A. He came to my house.

Q. He came to your house sometimes? A. Yes.

Q. Would this mostly take place on Saturday?

A. All throughout the week, any days; no special day.

Q. These transactions, then, went over a period of weeks and weeks and weeks during the year 1945, is that right? A. Yes.

(Testimony of Juanita Jackson)

Q. You were apprehended. You were apprehended outside of the State of California, were you?

A. Yes; I was.

Q. Denver, Colorado, just to be exact? A. Yes.

Q. Brought back to the City of Los Angeles?

A. Yes; I was.

Q. And you gave about the same statement that you are giving to this court at the present time to the officers?

A. Yes; I have.

Q. And you told them about these various checks and you told them about Mr. Hayman pointing the mail boxes out to you? [42]

A. Yes; I have.

Q. Do you remember the largest amount that you cashed on one check?

A. No; I don't.

Q. Would that necessitate your signature on the back before you cashed them?

A. Well, yes.

Q. Did you so sign the checks? A. Yes.

Q. Did you endorse the check? A. Yes; I did.

Q. And show your credentials or identification?

A. Yes.

Q. When they were asked for? A. Yes.

Q. On some occasions they were not asked for, is that right?

A. That is right.

Q. And you bought articles, did you?

A. Not all the time.

Q. Did you sometimes buy articles? A. Yes.

Q. Well, what place do you recall where you bought some articles and took the balance in change or money?

A. Liquor stores. [43]

Q. Liquor stores? A. Yes.

(Testimony of Juanita Jackson)

Q. You would buy liquor?

A. Yes; at the liquor stores.

Q. And you would come out on that occasion, would you not, to Mr. Hayman? A. Yes.

Q. You would give him the money that was remaining? A. Yes.

Q. And he would then give you a portion, is that right? A. Yes; he would. Yes.

Q. What portion of the money did he give you, or do you recall? What was the arrangement as to the amount? Was it a per cent deal?

A. No; it was not per cent. It depended on a lot of things as to how much I got.

Q. Oh, then, it varied in amount? A. Yes.

Q. But always you got some and always he got some from each check, is that right? A. Yes.

Q. What the amount was you don't remember?

A. No; I don't.

Q. You can't recall. The fact that you had known Mr. [44] Hayman for seven years is a consequence of having gone to school together, is that right?

A. Yes.

Q. You associated with him very closely?

A. No.

Q. Socially or otherwise? A. Not closely.

Q. Just in a business way, is that right?

A. Well, in school, knowing him. I knew him and, "Hello, there." Just in school times; nothing, no personal friendship.

Q. Since your school, I believe you said that you only associated with him in a business relationship, is that right? A. Yes, yes.

(Testimony of Juanita Jackson)

Q. Then this was a business between you and he, is that right? A. Well, that is what I would call it.

Q. Is that the business you have in mind, the passing of checks and the cashing of checks?

A. I just used that term. Yes; that is what I meant when I said that.

Q. Were you ever in business together in any line of business? A. No, no. [45]

Q. You can't recall of cashing a \$100.00 check, can you, in any particular liquor store?

A. No; I can't, just any certain check. No.

Q. You can't remember any certain check?

A. No.

Q. Did you live away from home at that time or did you live home? When I say "home", did you live with your parents or did you live in separate places?

A. At what time?

Q. Well, at the time that you were passing these checks around the city?

A. I lived at home, back and forth.

Q. Back and forth? A. Yes.

Q. When you say "back and forth"—

A. From my home to my mother's home.

Q. Your home. Then you had a home of your own, is that right?

A. Yes. My mother purchased a home for me.

Q. Where is that? A. 5530 Duarte.

Q. That was your home, is that right?

A. Yes. That is what I mean when I say "my home."

(Testimony of Juanita Jackson)

Q. Was that the place where Mr. Hayman met you, at your home or your mother's home, back and forth? [46]

A. He would come to my home at times and to my mother's house at times.

Q. And both places you would meet him, then, is that right? A. Yes.

Q. Do you remember Mr. Hayman ever signing his name to any check or any other instrument of any kind at any time?

A. I don't distinctly know, but I have heard—

Q. I don't want to know what you have heard.

A. Well, you asked me had I heard.

Q. No; I didn't, A. I beg your pardon.

Q. That is not what you remember, what you heard.

A. I beg your pardon.

Q. Do you remember having seen Mr. Hayman, in your presence, sign any of these instruments, the checks or any other instruments, identification cards or otherwise? A. Yes; I have.

Q. Do you remember what check that was?

A. No; I don't.

Q. But it was a check, is that right?

A. Well, you said, "or card." I do remember him signing an identification card.

Q. Do you remember his signing an identification card? [47] A. Yes.

Q. And that is the only time that you remember having seen him sign anything?

A. Maybe one or two occasions I have seen him sign, yes, checks—a check, yes.

Q. And this relationship was productive of much money, both to you and the defendant, Mr. Hayman, was

(Testimony of Juanita Jackson)

it; that is, this business relationship which you talk about, robbing mail boxes and cashing checks gave you considerable money and it gave the defendant considerable money, is that right? A. Well—

Q. Not much? A. Well, not much for me.

Q. Not as much as you needed, because you worked, I believe you said, at a beautician's place sometimes during the year, so you were employed other than getting money by this means of cashing checks? A. Yes.

Q. Are you related to Mr. Hayman?

A. No; I am not.

Q. There is no relationship between the two of you?

A. No.

Q. Now, I will ask you again—I hate to repeat this question—did you ever see Mr. Hayman sign his name on the back of a check or any other portion of a Government [48] draft or check? A. Yes; I have.

Q. You have seen him sign names, have you?

A. Yes.

Q. And do you recall what check that was and what time and what place? A. No; I don't.

Q. He signed whose name, if you remember?

A. Whatever name was on the check.

Q. And he signed it himself? A. Yes.

Q. And you went in and cashed that check, or did Mr. Hayman cash it, as you recall?

A. Mr. Hayman did.

Q. Mr. Hayman cashed the check himself on those occasions? A. Yes; he did.

Q. Were you present? A. No.

Mr. Entenza: That is all.

Mr. Ritzi: Just one additional question.

(Testimony of Juanita Jackson)

Redirect Examination

By Mr. Ritzi:

Q. How many times or how many days out of a week would [49] you say that you and the defendant went about in his automobile looking for these checks? Was is every day, was it one or two days a week, or just how frequently or how many times on an average during the week?

A. On an average, I would say two or three times a week.

Q. Two or three times a week?

A. In that area that they were taken from in the car.

Q. Would you drive directly to the check or would you drive up and down side streets looking for checks on the way? What was the mode of procedure?

A. Sometimes it was directly, and then sometimes we drove around.

Q. Drove around looking for checks? A. Yes.

Mr. Ritzi: That is all.

Recross Examination

By Mr. Entenza:

Q. Did you cash any checks in Long Beach?

A. No; I haven't.

Q. Did you cash any in San Diego, California?

A. No; I haven't.

Q. Did you go to San Diego, California with Mr. Hayman?

Mr. Ritzi: I think that is beyond the scope of re-direct. [50]

The Court: Overruled.

(Testimony of Juanita Jackson)

Mr. Entenza: I want to show, if the court please, that they drove many places and they did not cash checks together.

The Court: Overruled. You may answer.

The Witness: What did you say?

Q. By Mr. Entenza: Did you drive to San Diego, California with Hayman?

A. To Tijuana about two years ago.

Q. That was before these transactions ever took place, is that right? A. Yes.

Mr. Entenza: That is all.

Mr. Ritzi: That is all.

The Court: Did you ever go up to a mail box and not find a check, not find any check or any envelope with a check?

The Witness: Well, usually, when the defendant said, "Well, there it is," it was usually there.

The Court: You could see it?

The Witness: Yes.

The Court: Could you see it from the street?

The Witness: Yes. On several occasions I didn't see it, but he said it was there and I went and looked and it was there. [51]

The Court: Was there ever a time when he told you it was there and you went up and looked and it was not there?

The Witness: No; not that I remember.

The Court: That is all I have.

Mr. Entenza: That is all.

The Court: You may step down.

(Testimony of Juanita Jackson)

Mr. Ritzi: If the court please, may this witness be excused? She is in custody. Otherwise, she is going to miss her lunch. And also, may Mr. Samuel T. Thompson and Charles A. Wilbun be excused as witnesses?

Mr. Entenza: There is no objection from the defense. I am not going to call them again.

The Court: Very well; Miss Jackson, Mr. Wilbun, and Mr. Thompson are all excused from further attendance.

Mr. Ritzi: If the court please, the Government desires to call Dorothy McClain.

DOROTHY McCLAIN,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Dorothy McClain.

The Clerk: Be seated. Spell your last name, please.

The Witness: M-c-C-l-a-i-n. [52]

Direct Examination

By Mr. Ritzi:

Q. Now, Miss McClain, do you know the defendant, Herman Hayman? A. I do.

Q. How long have you known him, Dorothy?

A. Oh, I don't know the exact date, but from around the last of '45 or maybe the first of '46, I imagine.

Mr. Entenza: I wonder if you would be kind enough to speak just a little bit louder, please?

(Testimony of Dorothy McClain)

Q. By Mr. Ritzi: Do you know what kind of a car the defendant had around 1945 or 1946?

A. During the year '46 he owned a '42 Buick convertible.

Q. And did you ever drive around with the defendant?

A. I sure did.

Q. Did you ever drive around to mail boxes, maybe?

A. Yes.

Q. Did you ever take anything out of those mail boxes? A. Yes; at times we have.

Q. What were they? A. Checks.

Q. Government checks? A. Yes.

Q. Did the defendant ever tell you to go up and take [53] those checks out? A. Yes; he did.

Q. How many times did that happen, Dorothy?

A. Well, as often as he felt like going around looking for them.

Mr. Entenza: I did not get that answer.

The Witness: Well, as often as he felt like going around looking for them.

Mr. Entenza: That is the voice I like.

Q. By Mr. Ritzi: After you obtained these checks did the defendant instruct you to place the payees' names on the back of those checks? A. Yes; he did.

Q. Can you estimate how many checks there were, whether one or two, or whether 100 or 50 or 25?

A. Well, whenever we would ride around and look for the checks, it was during the time that the checks was coming out in the mail, and sometimes he would come by my house with checks for me to endorse. It was according to how many he could pick up.

(Testimony of Dorothy McClain)

Q. Did the defendant ever take any of those checks out of mail boxes, to your knowledge?

A. Yes; he has.

Q. I think I asked you this question: You say you took some of the checks out? [54]

A. Yes; I have taken checks out of boxes.

Q. Would the defendant point out the checks to you?

A. Yes.

Q. Where would he stop his automobile, in front of the house, or up or down the street?

A. Sometimes he was a couple of doors from where the check was.

Q. Did he tell you the check was in that box?

A. Yes. I would see it in the box.

Q. Did you hand the checks over to the defendant?

A. Yes, sometimes, and sometimes I would open them.

Q. And who put the payees' names on the checks?

A. I would.

Q. Who cashed the checks? A. I would.

Q. Did you give the money to the defendant?

A. Yes.

Q. Did you split the proceeds or did the defendant give you part of the money for the checks?

A. Yes; he did.

Q. What type of stores, normally, would you go to?

A. Well, sometimes it would be liquor stores, men's clothing stores, and sometimes shoe store.

Q. By the way, Dorothy, I show you an identification card—counsel, you have already seen this—and ask you [55] if that is you and that is your signature on there?

A. Yes.

(Testimony of Dorothy McClain)

Q. Did you ever use that card in cashing a check?

A. Yes; I did.

Q. Did the defendant give you that card?

A. I don't remember. That is a commercial check, isn't it?

Q. I don't know.

A. I don't know. He probably did, because he is the one that produced the cards.

Q. Did the defendant ever have any of these cards made out in blank? A. Yes; he did.

Q. Did he ever tell you how many of those cards he had made out?

A. Well, if I am not mistaken, I think it was 500.

Q. Each time you cashed a check did the defendant give you one of these cards? A. Yes; he would.

Q. Did you place your signature thereon?

A. Yes.

Q. Would you use this card or a similar card to pass the check? A. Yes.

Q. Is that your handwriting or the defendant's? [56]

A. That is my handwriting.

Mr. Ritzi: That is your handwriting. If the court please, Government's Exhibit No. 1 in evidence.

The Court: Is it offered in evidence?

Mr. Entenza: Yes. I want to question this witness about it.

Mr. Ritzi: I have more examination.

The Court: Is there objection to this offer?

Mr. Entenza: No; not at all.

The Court: The card is received into evidence and will be marked Government's Exhibit.

(Testimony of Dorothy McClain)

The Clerk: 1, your Honor.

Mr. Ritzi: I show you a check made out to Lieutenant Charles A. Wilbun and ask if you have ever seen that particular check before? A. Yes; I have.

Q. Do you notice the endorsement on the back of that check? A. Yes.

Q. Who placed that endorsement there?

A. I did.

Q. Was that done at the defendant's instance?

A. Yes. Well, I don't know if the defendant was around, but it is one that he gave me.

Q. That is one of the checks that the defendant gave [57] you? A. Yes.

Q. I am going to show you a pair of shoes here and ask if you have ever seen those particular shoes before.

A. Well, I don't know if those are the exact shoes but I have seen shoes like that.

Q. Where did you see shoes like that?

A. Well, I have seen the defendant wearing a pair of them.

Q. Well, do you know where he purchased those shoes?

A. Well, if those are his, from Goodwin's Shoe Store out in Hollywood.

Q. Were you along when he purchased the shoes?

A. Yes, sure.

Q. Was this check given in payment for those particular shoes? A. Yes; it was.

The Court: By "this check" you refer to what?

Mr. Ritzi: The check made to Lieutenant Charles A. Wilbun, your Honor, in the sum of \$282.50.

Q. Did the defendant purchase anything else at that time? A. Yes; he did.

(Testimony of Dorothy McClain)

Q. What else did he purchase?

The Court: Let us mark that check for identification. [58]

Mr. Ritzi: Yes, your Honor.

A. Well, it was a shoe store, so there wasn't anything but shoes he purchased out there.

Q. Well, do you recall did he purchase several pairs of shoes, or were there a number of pairs of shoes?

A. Well, there was sixty some odd dollars worth of shoes.

The Court: The Wilbun check is Exhibit 2 for identification?

The Clerk: That is correct, your Honor.

Q. By Mr. Ritzi: As I recall it, you said that he purchased sixty some odd dollars worth of shoes. Did you receive the difference between the Wilbun check and the price of the shoes? You tendered the check in payment of those shoes in the presence of the defendant, is that correct?

A. Yes.

Q. And the clerk handed you some change?

A. Yes; he did.

Q. What did you do with that change or with the bills?

A. Well, when the defendant went and got the car and picked me up on the corner of whatever the street was—I don't recall—I handed the change over to him and he gave me the amount that he wanted me to have.

(Testimony of Dorothy McClain)

Q. Do you recall what that amount was?

A. No; I sure don't. [59]

Q. These, however, appear to be one of the pairs of shoes that the defendant purchased? A. Yes.

Mr. Ritzi: I think I will introduce these for identification, if the court please.

The Clerk: 3 for identification.

The Court: That is the pair of shoes?

Mr. Ritzi: Yes, sir, your Honor. If the court please, this \$100.00 check, I do not think the Government has introduced that for identification. I think I will at this time.

The Court: Which check is that?

Mr. Ritzi: It is \$100.00 check made payable to Samuel T. Thompson.

The Court: Very well.

The Clerk: It will be Exhibit 4 for identification.

Mr. Ritzi: Yes.

Q. Now, I show you a bill which appears to be on the Goodwin Shoe Company, on one of their regular slips.

Pardon me, counsel, have you seen this?

Mr. Entenza: It is all right. I will see it afterwards.

Q. By Mr. Ritzi: —made out to Charles A. Wilbun, 1615 East 47th Street, and ask if that appears to be the bill that was given to you in payment of those shoes?

A. Yes; it does. [60]

(Testimony of Dorothy McClain)

Mr. Ritzi: If the court please, I will introduce this as Government's next in evidence, I think.

Mr. Entenza: No objection.

The Court: The sales slip?

Mr. Ritzi: Yes, your Honor.

The Court: Of the Goodwin Shoe Company?

Mr. Ritzi: Of the Goodwin Shoe Company.

The Court: It will be received into evidence and be marked Government's next exhibit.

The Clerk: 5, your Honor.

The Court: At this time we will take the noon recess. Is there objection to resuming at 1:30?

Mr. Ritzi: None at all, your Honor.

Mr. Entenza: None at all. In fact, I will appreciate it.

The Court: You may step down.

Mr. Ritzi: May the witnesses be instructed to return at 1:30?

The Court: Yes. All witnesses in the case of United States against Herman Hayman are instructed to return to this court, to this room, at 1:30 this afternoon. You are excused at this time until 1:30 and the trial is recessed until that time.

(Whereupon a recess was taken until 1:30 o'clock p.m. of the same day, Tuesday, January 7, 1947.) [61]

Los Angeles, California, Tuesday, January 7, 1947,
1:30 P.M.

Mr. Ritzi: Dorothy McClain. I believe she was our last witness.

The Court: Is the defendant present?

The Clerk: Yes, sir.

DOROTHY McCLAIN (Recalled)

Direct Examination (Resumed)

Q. By Mr. Ritzi: Miss McClain, is that Miss or Mrs.?

A. Miss.

Q. Miss. What type of stores or institutions were most of these checks cashed at, do you recall?

A. Liquor stores, men's clothing stores, and sometimes regular check-cashing places.

Q. Did the defendant ever tell you how much he was making each week out of these?

A. No; he didn't.

Q. He didn't state to you?

A. No; he didn't.

Q. Did you ever observe the defendant sign any of the checks himself, the payee's name?

A. I think two or three times he did.

Q. Two or three times. Did you testify this morning [62] whether or not you signed any of the payee's names at the defendant's request?

A. Yes, sir; I did.

Q. You did. Was there a substantial number of checks involved, do you recall?

A. Well, I don't recall just how many there really was, but there was quite a few.

Mr. Ritzi: Quite a few. I see. I think that is all.

(Testimony of Dorothy McClain)

Cross Examination

By Mr. Entenza:

Q. Didn't you say this morning that you had known Mr. Hayman or Hayman since 1942, or before that, or did I misunderstand you?

A. You misunderstood me.

Q. How long had you known him?

A. I said, around the last part of '45 or the first of '46.

Q. '45 or the early part of 1946? A. Yes.

Q. Speaking about the purchase of shoes, did I understand you to say that he bought the shoes?

A. Yes; he did. At least he chose the shoes that he wanted.

Q. He showed you the shoes that he wanted? [63]

A. He chose the shoes that he wanted me to pay for out of the check.

Q. You were to pay for them?

A. Yes; out of the check.

Q. You had the check, is that right?

A. Yes; I did.

Q. Did you go into the shoe store together?

A. Yes; we did.

Q. Can you remember how many pairs of shoes he bought or how many pairs of shoes he tried on, or do you recall either? A. I don't recall.

Q. Did you buy some shoes for yourself?

A. No; I didn't.

Q. You just bought the shoes for Mr. Hayman, is that right? A. Yes.

Q. Do you remember any conversation that you had with Mr. Hayman before you went into the shoe store as

(Testimony of Dorothy McClain)

to whether or not he would pay you back if you bought some shoes for him? A. Yes.

Q. He did say that, did he? A. Yes.

Q. And when you got into the store and you purchased [64] the shoes, you paid for the shoes with the check? A. Yes.

Q. And in the presence of the proprietor or of the clerk or whomsoever served you?

A. That is right.

Q. You endorsed the back of the check, is that right?

A. I sure did; yes.

Q. Did he supply you with a pen?

A. Yes; he did.

Q. The proprietor of the place or the manager, whomsoever he might be, supplied you with a pen and you wrote your name on the back of the check?

A. No; not my name.

Q. Well, you wrote the name that was in the check, is that right? A. Yes.

Q. Had you been practicing the name at all in writing?

A. No; I didn't.

Q. You just remembered the name and placed it on the check? A. Yes.

Q. Do you remember now what the name was?

A. Charles A. Wilbun.

Q. And that was the name that you placed on the back [65] of the check? A. Yes.

Q. Charles, did you say? A. Yes.

Q. That indicated that it was a man that the check was made out to? A. Yes; it was a man.

(Testimony of Dorothy McClain)

Q. And yet you signed the check in the presence of the manager, "Charles"? A. Yes.

Q. And you tendered the check in payment for the shoes, they wrapped the shoes up, did they, or put them in a box?

A. I don't recall if they were in a box or not, but they did wrap the shoes up.

Q. Do you recall the amount of change that you got back from the check? A. No, sir; I don't.

Q. But he did give you currency and change for the check? A. Yes.

Q. That is, the balance from the purchase of the shoes? A. Yes.

Q. Did you then walk out with Mr. Hayman? [66]

A. Yes; I did.

Q. Where was his car at that time?

A. Well, it was not directly in front of the shoe store but it was—

Q. You say Hayman's car was directly right in front?

A. I said it was not.

Q. It was up the street a half a block?

A. No; it was not half a block. I would say it was maybe three or four doors down from the store.

Q. Then there were a lot of cars parked by the curb there? A. Yes; there was.

Q. By the way, I don't know whether you were asked or not the location of this shoe store.

A. Well, I don't know the exact address of it. I know it was in Hollywood.

Q. It was a Hollywood shoe store but you can't recall the exact location? A. No; I can't.

(Testimony of Dorothy McClain)

Q. Had you been in the shoe store before?

A. No; I hadn't.

Q. Did you notice any of the shoes in the window, either you or Mr. Hayman?

A. Well, at the time we went into the store he wanted a pair of shoes like the ones I saw here this morning. [67]

Q. Like the ones that were exhibited here this morning?

A. Yes.

Q. He tried them on, did he?

A. Yes; he did.

Q. And said that he liked those shoes?

A. Yes.

Q. In walking out together did you walk down to his car?

A. No. I walked to the corner and he went—

Q. Did you walk in opposite directions?

A. Yes. And he went and got the car and picked me up on the corner.

Q. Did you meet him immediately after that?

A. Yes; as soon as he got the car and came and picked me up.

Q. He drove around and picked you up, is that right?

A. Yes.

Q. Do you recall where you went from that place, the shoe store?

A. No; I don't.

Q. Did he allow you to keep the money that you had in change that day?

A. No; I gave the money to him.

Q. You gave some money to him? [68]

A. I gave the money to him that I got from the check after he bought the shoes.

Q. You don't remember how much you gave him?

A. No; I sure don't.

(Testimony of Dorothy McClain)

Q. You divided it, however, is that right?

A. No. He divided it.

Q. He divided it? A. Yes.

Q. You gave all the money to him?

A. Yes; I did.

Q. And he in turn divided the money with you?

A. Yes.

Q. You can't remember how much you got?

A. No; I don't.

Q. You don't remember how much he received?

A. No; I don't.

Q. You testified that you had gotten some of these checks from mail boxes, is that right? A. Yes.

Q. After having been informed that the mail box contained a check? A. Yes.

Q. Do you recall how the checks were pointed out to you by the defendant Hayman?

A. Well, we would be riding around and he would notice [69] the check in the box and ask me to go get the check.

Q. He would ride around with you?

A. Yes; he would.

Q. And he would point out from the driver's seat of the car on either side? A. Yes.

Q. A mail box and would say "in that mail box"?

A. "There is the check."

Q. "There is the check"? A. Yes.

Q. And you would put your hand in the mail box and pull the letters out? A. No. I would see the check.

Q. You would see the check.

A. And get the check.

(Testimony of Dorothy McClain)

Q. How did you see the check?

A. Well, it was where you could see it. It was out, maybe, sticking out of the box and you could see it through the box, and you just got part of your hand in and got it.

Q. See if I understand this mail box. Was this one of those iron or steel boxes that they have on corners for picking up mail?

A. No; it wasn't.

Q. It was a mail box in front of a house, was it?

A. Yes; it was a residential mail box. [70]

Q. Was it open? A. Yes; it was open.

Q. It was one of these open boxes where you put the mail in and the collector picks it up?

A. Well, it was on the house, just a regular mail box like on a house, someone's home.

Q. You could see through the opening in front?

A. Yes. Sometimes it had a little opening and sometimes it didn't have the top on it.

Q. Did you ever go to one of those mail boxes and not find a check?

A. No; I didn't.

Q. You always found a check in this mail box?

A. Yes.

Q. Would you recall any of the places where you happened to have picked up one of these Government checks?

A. No; I don't.

Q. Then it was just a ramble around the city?

A. Yes, sir; it was.

Q. Here and there, and he pointed them out to you, you got out of the car, putting your hand in the mail box and taking this certain check out?

A. Yes.

Q. In taking the check out did you take other mail along with it sometimes? [71]

A. No.

(Testimony of Dorothy McClain)

Q. You knew exactly where that check was and you knew how to pull it out of the other letters that might be in the box, is that right? A. Yes; that is right.

Q. Did the box contain papers as well as letters?

A. Sometimes.

Q. It was a mixed box?

A. Sometimes they did.

Q. Sometimes papers were in there, too, is that right?

A. Yes; that is right.

Q. Was that incoming mail or was it outgoing mail or do you know?

A. Well, the outgoing mail would be down on a little hanger under the box.

Q. That was outgoing mail? A. Yes.

Q. And where you received the check was the incoming mail? A. That is right.

Q. And do you remember the largest check that you happened to have found in one of those mail boxes?

A. No; I sure don't.

Q. Do you remember the smallest one?

A. No; I don't. [72]

Q. In every instance you speak about here you were in the company of Mr. Hayman, is that right?

A. Yes; I was.

Q. And were you ever in company with anyone else in picking up checks? A. Yes; I was.

Q. Then there was someone else involved besides you in picking up the checks? A. Sure it was.

Q. A man? A. No.

Q. A woman? A. Yes.

Q. In that instance who pointed out the checks?

A. Herman Hayman.

(Testimony of Dorothy McClain)

Q. I asked you whether you were in company of someone else, in the absence of Mr. Hayman?

A. Oh, no; I was not.

Q. He was always along when you found the check?

A. Yes.

Q. And sometimes two women would be along, is that right?

A. That is right.

Q. Would you mind mentioning who the other woman was?

A. Juanita Jackson. [73]

Q. And the two of you then would be together?

A. Yes.

Q. Did you travel quite frequently, the three of you together?

A. Just as often as he wished.

Q. And you went out in the evenings together, did you?

A. Yes; we have gone out in the evenings.

Q. To cafes together?

A. No; no cafes.

Q. You went to San Francisco together, didn't you?

A. No. I have never been to Frisco.

Q. Went to San Diego?

A. Yes; we went to San Diego.

Q. Did you find any checks there that were pointed out to you?

A. We didn't go for that purpose.

Q. Did you go to Long Beach?

A. No.

Q. Did you go to any other neighboring city in the environs of Los Angeles?

A. No.

Q. Then, Los Angeles was the only place of operation?

A. That is right.

Q. Santa Monica?

A. No. [74]

Q. You did go to Santa Monica, though, didn't you?

A. I have never been to Santa Monica.

(Testimony of Dorothy McClain)

Q. If you were never there, of course, you never found any checks there. And did you go to Bakersfield?

A. No.

Q. Were you picking up checks in Glendale?

A. No.

Q. Any in Hollywood? A. No.

Q. Well, can you define the district in which you found the checks?

A. Well, just wherever he felt like driving or riding to see where he could find checks.

Q. Was it particularly directed to the neighborhood in which white people lived mostly or was is colored people in the neighborhood?

A. Well, just sometimes it was colored and sometimes it was white.

Q. Sometimes colored as well as white?

A. Yes.

Q. It made no difference what the color was so long as the check was there, is that right?

A. That is right.

Q. Do you remember whether or not Mr. Hayman was working? [75] A. Yes; he was.

Q. Could you recall where he was working?

A. Kirkhill Rubber Company.

Q. Did you ever have occasion to go out to the rubber company and wait for him?

A. Yes; I have gone out there.

Q. And did you wait at the gate?

A. It wasn't a gate to wait.

Q. Where did you wait for him around the rubber plant? A. In the car.

(Testimony of Dorothy McClain)

Q. In the car? A. Yes.

Q. In his car? A. Yes.

Q. Then his car was parked in a certain place and you knew where it was parked? A. Yes; it was.

Q. You got in the car and waited until he was finished with his employment? A. Yes; I **did**.

Q. Sometimes that would be late in the afternoon, would it? A. That was only once.

Q. A quarter of one?

A. I say, it was only once. [76]

Q. Only once? A. Yes.

Q. Do you know of any other place where he was employed? A. No; I don't.

Q. You are now incarcerated, aren't you, in Tehachapi? A. Yes; I am.

Q. Having pleaded guilty in one of these check cases?

A. Yes.

Q. And you are here to testify in accordance with the evidence as you remember the evidence to be?

A. That is right.

Q. Do you recall ever having gone to Las Vegas, Nevada, with Hayman? A. No; I don't.

Q. Then you confined your trips with Hayman to right around Los Angeles, with the exception of these trips that you made to San Diego? A. Yes.

Mr. Entenza: That is all.

Redirect Examination

By Mr. Ritzi:

Q. Do you know if the defendant had other girls working for him in the theft of these letters? [77]

A. Not that I know of.

(Testimony of Dorothy McClain)

Q. Do you know Chestine Thomas?

A. Yes; I know her.

Q. Do you know if the defendant had her working for him? A. Not that I know of.

Q. How about Ethel Dolan?

A. Yes; she worked.

Q. She has worked for the defendant? A. Yes.

Q. In stealing checks? A. Yes.

Q. You know that? A. Yes.

Q. You are in Tehachapi because of some check charges? A. Yes.

Q. Who gave you those particular checks, by the way?

A. Herman Hayman.

Mr. Ritzi: That is all, thank you.

Mr. Entenza: Just a minute.

Recross Examination

By Mr. Entenza:

Q. Did you say that other girls were working for this fellow? [78] A. Yes.

Q. Were you in company with those girls?

A. Yes.

Q. Well, then, there were other girls than Miss Parker, is that right? A. I don't know Miss Parker.

Q. Well, the girl that you mentioned was whom?

A. Juanita Jackson.

Q. Juanita Jackson was the only girl that you mentioned. There were other girls that you were in company with?

A. Ethel Dolan—her name is Ethel Jones.

Q. That is an afterthought? A. Yes.

(Testimony of Dorothy McClain)

Q. The memory of that girl comes now after you have mentioned Mrs. Jackson's name. Where did you go with her? A. With whom?

Q. This last named lady? A. Dolan?

Q. Yes.

A. Right around in Los Angeles the same way.

Q. Was she in the car with you?

A. It has been sometimes she was.

Q. Sometimes three of you in the car?

A. Yes; it has been.

Q. That is three ladies and one man, the defendant? [79] A. Yes.

Q. With anybody else? A. Not that I know of.

Q. Did you ever see her get out and find a check?

A. Yes.

Q. Yes. Yourself and two of you women remained in the car while she stepped out to get the check?

A. Yes.

Q. In that instance where would the car stop?

A. Up the streets wherever he would see a check and wanted to stop up the street.

Q. What kind of a car was he driving at that time?

A. I think he was driving a little blue Mercury at that time.

Q. He was doing the driving, was he?

A. Yes; he was.

Q. These identification cards shown you this morning, how did you get your photograph on those cards?

A. I put it on there.

Q. You put them on yourself? A. Yes.

(Testimony of Dorothy McClain)

Q. Was it taken from a larger photograph than that of a snapshot? A. Instead of a snapshot.

Q. It was a snapshot. You would paste them on your- [80] self? A. Yes.

Q. How would you paste them on?

A. Sometimes with gum, sometimes we would have glue, mucilage.

Q. And you filled the card out then yourself in your own handwriting? A. Yes.

Q. If there was anything to fill out there at all?

A. I have did that.

Q. Did you get these cards out of Mr. Hayman's car?

A. Yes; I did.

Q. Did you know they were located in the car?

A. No; I didn't.

Q. Did you get many cards out of the car or did you get but one card?

A. As many checks as he would give me, he would give me the same amount of cards.

Q. He would give you a card on every identification?

A. Yes.

Q. And you had a fresh identification each and every time, is that correct? A. That I cashed a check.

Q. Every time you would cash a check you would write [81] your name on that card? A. Yes.

Q. And your picture, you would verify the person?

A. Yes.

Q. And you would then present that to the liquor man or whomsoever you were cashing it from, and he recognized your face and he recognized the name upon the back of the check; you would write that name, is that right?

A. That is right.

(Testimony of Dorothy McClain)

Q. And you would cash the check and go out into the car and give it to Mr. Hayman, is that right?

A. Yes; that is right.

Q. And when the three of you women were together and you brought a check in how was the division then made?

A. Well, it is according to who would cash the check.

Q. Who would cash the check would get their per cent?

A. Yes.

Q. Do you remember anything about the per cent being spoken about? What per cent did you get, for instance?

A. Oh, it wasn't a per cent. It was just whatever he felt like giving me.

Q. Whatever he felt like giving you?

A. Yes.

Q. And you were not working at the time, were you?

A. Well, I was working at one time. [82]

Q. Did you work any during the year 1946, say, starting last March?

A. No; I didn't.

Q. You lived, then, practically upon the proceeds of the amounts that he gave you as the differential in the check cashing?

A. I was getting money from where I used to work.

Q. You were drawing money in other places?

A. Yes.

Q. Did you cash any of these checks in check-cashing places?

A. Yes; I did.

Q. You cashed several checks, did you not, on Broadway?

A. Yes; I probably did.

Q. At 315 Broadway, in the entrance of the building?

A. I don't know the exact address.

(Testimony of Dorothy McClain)

Q. Do you remember the size of the checks that you cashed there?

A. I don't even know where you are talking about there.

Q. You remember you did cash a check on Broadway somewhere?

A. Yes; I have cashed checks on Broadway.

Q. Where was the defendant located at that time as to [83] his car?

A. Wherever he found parking space.

Q. He would find a parking space? A. Yes.

Q. Would he find a parking place first and you walk out of the parking place toward the checking place?

A. Yes, sir; that is right.

Q. You knew what parking place he was parked in each instance? A. I knew where to find him.

Q. Did you know where to find him on this date?

A. What date?

Q. What is it? A. What date?

Q. The date you cashed this check on Broadway.

A. He was in the store with me.

Q. Did he go into the check-cashing place with you?

A. Which check are you talking about?

Q. I asked you if you cashed a check in a check-cashing place on Broadway.

A. I have cashed several checks at several cashing places on Broadway.

Q. There are several places on Broadway?

A. Yes.

Q. He was with you on some of these occasions? [84]

A. Yes; he has been with me.

(Testimony of Dorothy McClain)

Q. He walked right in there with you, did he?

A. Yes; he has.

Q. In that instance he was not out in the automobile, seated up the block; he was right with you?

A. At that time. At times he has been, and at times he has been sitting up in the car, up the block.

Q. And he was standing right alongside of you when you cashed the check? A. Sometimes he has.

Q. Do you remember the largest check you cashed?

A. No; I don't.

Q. The relationship between you and Mr. Hayman was merely based upon friendship, is that so?

A. That is all; just associates.

Q. And you knew one another before you started to cash these checks, did you not? A. Yes; we did.

Q. You kept company with one another, did you?

A. No, no, no.

Q. Do you know his family?

A. I know his wife.

Q. Any children? A. I have seen them.

Mr. Entenza: That is all. [85]

Redirect Examination

By Mr. Ritzi:

Q. You mentioned a blue Mercury that the defendant had. Did he have any other type of automobile that you recall?

A. No, not—no, other than the Mercury and the Buick that he has.

Q. Did you say he had a Buick.

A. He had a Mercury before the Buick. He just got it.

(Testimony of Dorothy McClain)

Q. What kind of a Buick was that?

A. '42 Buick.

Q. Was that a convertible coupe or a sedan?

A. Convertible.

Mr. Ritzi: That is all.

The Court: You may step down. Mr. Clerk, will you call the 2:00 o'clock calendar?

(Intermission for other court proceedings.)

The Court: You may call your next witness.

Mr. Ritzi: Mr. Paul Redd, please.

PAUL CHESTER REDD, III,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Paul Chester Redd the third. [86]

Direct Examination

By Mr. Ritzi:

Q. Mr. Redd, do you know the defendant in this case, Mr. Hayman? A. Yes; I know him.

Q. How long have you known him?

A. I have known him since about June—let me see. I met him about in June, 1945, up until now.

Q. Where did you live during that time?

A. 4181 Compton Avenue.

Q. Were you living there at that time?

A. Yes, sir.

Q. Did the defendant ever bring any checks to you and ask you to forge the payees' names on the back of those checks? A. Well, yes.

(Testimony of Paul Chester Redd, III)

Q. He did. Let me show you a check here, the check contained in counts 1, 2 and 3 of the indictment. It is a check made out to "Samuel T. Thompson" in the sum of \$100.00, and ask you to look at the endorsement on the back of that check. A. Yes; I see it.

Q. Whose handwriting is that?

A. My handwriting.

Q. Is that your handwriting? [87] A. Yes, sir.

Q. Who asked you to put that endorsement on that check?

A. Well, when it was brought around I was asked to put it on there by the defendant.

The Court: Please speak louder.

The Witness: Oh, I am sorry. Well, it was brought around and I was asked to sign it by the defendant.

Q. By Mr. Ritzi: The defendant asked you to put the payee's name on that? A. Yes.

Q. Did the defendant frequently bring checks to you and ask you to put the payee's name on the back of those checks?

A. Well, I couldn't remember over four times at the most, but they had five checks but they said my handwriting meant—

Q. I show you a group of checks here, one to W. L. Stamford in the sum of \$100.00; another one to William L. Weaver in the sum of \$139.00; another one to Ray H. Rumsey in the sum of \$100.00; another one to William S. Burn in the sum of \$100.00; and you have already seen the Thompson check. Will you look at those checks and tell me if you recognize them? A. Okay. [88]

(Testimony of Paul Chester Redd, III)

Q. Look on the rear of the checks, too, at the endorsements.

The Court: What you referred to as the Thompson check is Exhibit 4 for identification?

Mr. Ritzi: That is correct. That is the check that the witness said he put the payee's name on.

A. Well, I remember these three. I don't remember this one.

Q. These three checks here, you mean the check in the sum of \$100.00 to W. L. Stamford, another one in the sum of \$139.05 to William L. Weaver, and the other one to Ray H. Rumsey?

A. Yes, sir.

Q. In the sum of \$100.00?

A. Yes.

Q. You have observed the endorsements on the rear of those checks?

A. Yes; I have.

Q. Whose handwriting are those endorsements?

A. It is my handwriting.

Q. Your handwriting. Who asked you to place the endorsements thereon?

A. Well, Herman Hayman.

Q. Herman Hayman?

A. Yes, sir. [89]

Q. Did you get any of the proceeds from these particular checks?

The Court: Speak loud, please.

A. Well, whenever I—I mean if I saw him again, why, he would let me have about, maybe, you know, about \$15.00 or \$20.00, like that, for signing the check. I mean I refused to sign the checks—

Mr. Ritzi: I will offer these checks into evidence as the Government's next exhibit.

The Court: What checks are you offering?

(Testimony of Paul Chester Redd, III)

Mr. Ritzi: The Stamford, the Weaver, and the Rumsey checks. They are similar acts. They are not the ones that were charged in the indictment.

The Court: Is there any objection?

Mr. Entenza: I will object to the admission of those two. The Thompson check I can't object to.

Mr. Ritzi: There are three, counsel. The Thompson check is already in.

Mr. Entenza: There are three others besides that?

Mr. Ritzi: Yes.

Mr. Entenza: Four in all?

Mr. Ritzi: There are four in all.

Mr. Entenza: I object to the other two.

The Court: There are three checks now being offered, as I understand his offer. [90]

Mr. Entenza: I am objecting to two of those.

The Court: Not mentioned in the indictment?

Mr. Entenza: Those not mentioned in the indictment I am objecting to their admission in evidence.

The Court: What is the ground of the objection?

Mr. Entenza: None other than the fact that they are not material. I can't very well avoid their appearance. I made the objection because I thought it was proper.

The Court: The purpose of the offer is for the limited purpose of—

Mr. Ritzi: Showing similar acts.

The Court: —negative mistake, showing intent.

Mr. Ritzi: Common scheme and plan of action.

The Court: Very well; the objection is overruled. The time charged in the indictment—

(Testimony of Paul Chester Redd, III)

Mr. Ritzi: I think the checks are around about the same time or reasonably close to it.

The Court: The three checks are received into evidence and will be marked Government's next exhibit.

The Clerk: 6, your Honor.

Q. By Mr. Ritzi: Did you cash any of these checks for the defendant?

A. No; I didn't. I mean after I signed them, they were always given back to him. I don't know what happened to them. [91]

Mr. Entenza: Can't you speak just a little bit louder?

The Witness: I say, after I signed them, they were given back and I don't know what happened to them.

Mr. Entenza: Did you give the checks back to him?

The Witness: The one I got them from; yes, sir.

Q. By Mr. Ritzi: By the way, do you know what type of automobile the defendant had at this time?

A. Let me see. I don't remember, but he had the Buick when I knew him.

Mr. Entenza: I object to that question as being irrelevant and immaterial as to what automobile he had. I don't know whether he was ever in that machine.

Q. By Mr. Ritzi: Were you ever in that machine?

A. Yes; like going to a show or something like that.

Q. Oh, I see. What type of car was that?

A. That was a Buick.

Q. A Buick? A. Yes.

Q. What year was it, do you know? A. A '42.

(Testimony of Paul Chester Redd, III)

Q. Do you know how many checks the defendant gave you and asked you to forge the payees' names thereon?

A. No, sir. Just those, you know, that have been brought out.

Q. Those were the only checks? [92]

A. Those were the only ones.

Mr. Ritzi: I see. That is all.

The Court: By "those" are you referring to the checks shown to you since you have been on the witness stand?

The Witness: Yes; those four.

The Court: The three comprising the Exhibit 6?

The Witness: Yes.

The Court: And the Thompson check?

The Witness: Yes, sir.

The Court: Exhibit 4 for identification.

Mr. Ritzi: That is all.

Cross Examination

By Mr. Entenza:

Q. Mr. Redd, what occasioned Mr. Hayman to go up to your house and give you some checks to endorse?

A. On what occasion?

Q. What occasioned it? What occasioned him to do it? Had you and he been rambling around together?

A. Oh, no. I mean I didn't, you know, I mean going to the show every once in a while and like that. But so far as rambling around, I mean I never hardly ever saw him besides that.

Q. Did you ever go to school with Hayman in your younger days? [93]

A. No; I didn't.

Q. Not here?

A. I say, I did not.

(Testimony of Paul Chester Redd, III)

Q. You did not? A. No.

Q. But you have known him since June, 1945, is that right? A. Yes, sir.

Q. And he came up into your house and gave you these checks? A. No, sir.

Q. Where did he find you to give you the checks?

A. Well, I mean there is a corner right around from my house. I would see him there.

Q. You would meet him there or you did meet him there. Was that your regular meeting place? Was that a place that you met him quite frequently?

A. Well, yes.

Q. On these occasions he gave you these checks? On one of these occasions he gave you these checks, is that right?

A. No. He handed them to me to sign and then I handed them back. He didn't give them to me, because I didn't want them.

Q. You say he did not give you the checks? [94]

A. He handed them to me to sign and I gave them back, and I never saw them any more.

Q. He handed you the checks and asked you to sign them, is that right? A. Yes, sir.

Q. Did he use the word "endorse"?

A. "Sign"; he used the word "sign".

Q. He just said, "sign the checks"?

A. Yes, sir.

Q. You had signed checks before, hadn't you?

A. My own.

Q. Your own checks. You had been working somewhere and received checks? A. That is right.

(Testimony of Paul Chester Redd, III)

Q. You knew where to sign the checks, didn't you?

A. I mean everybody who knows how to work knows how to sign checks.

Q. You signed the check there and signed it on the back?

A. It was turned over when it was handed to me.

Q. When it was handed to you it was already turned over?

A. Yes, sir.

Q. You did not turn it over?

A. No, sir. [95]

Q. You did not ascertain how much the check was for when you signed it?

A. No. The only time I knew the amount was when they showed it to me up there, because I had forgotten about the whole thing.

Q. There was a name written in the check, is that right?

A. In the check?

Q. Yes.

A. You mean on the check?

Q. Yes; on the check.

A. I mean it was—well, it was told to me. I mean, you know, he was on—it was on a little piece of paper. I just copied it off the paper.

Q. Did you look at the name?

A. On the check?

Q. On the check.

A. No. It was already written on a little slip of paper.

Q. A little slip of paper where?

A. What?

Q. Who wrote the name down on a little slip of paper?

A. I don't know who wrote it but it came with the check.

Q. It came with the check, the name? [96]

A. Yes.

(Testimony of Paul Chester Redd, III)

Q. Did you turn it over yourself or was it turned over, as you stated a little while ago, and you then endorsed it?

A. It was turned over and then I endorsed it.

Q. What name did you endorse?

A. The name that was on that piece of paper.

Q. The name that was on that piece of paper that accompanied the check?

A. Yes, sir.

Q. You wrote that name on the back of the check, is that right?

A. That is right.

Q. On this occasion you wrote it on three checks, did you, or one check or two checks or five checks or ten checks or how many checks?

A. On all the checks that were shown to me. They were not all shown to me at once. They were shown to me at different times, but they were all given to me in the same way.

Q. They were all given to you in the same way?

A. Yes.

Q. You met him at the corner, did you?

A. Yes. Yes, sir.

Q. And at the corner he gave you these checks, is that [97] right?

A. Yes; one at a time.

Q. One at a time?

A. Yes.

Q. Then where did you go to endorse them?

A. I stood right there.

Q. Right standing there, right there on the street?

A. Yes, sir.

Q. Was it in the day time or in the night time?

A. It was in the afternoon.

(Testimony of Paul Chester Redd, III)

Q. It was in the afternoon. Did you place the check up against the wall or upon a hard surface of some kind to write the name on the back?

A. I held it in my hand.

Q. And wrote on the back of the check in your hand?

A. Yes, sir.

Q. And you gave the check back to Mr. Hayman?

A. Yes, sir.

Q. What is the largest number of checks that he gave you on any one occasion? A. One check at a time.

Q. One check at a time. Would you say one check a day or one check handed to you five minutes after three and ten minutes after three another one, or two minutes after three? [98]

A. Oh, no, sir. They were all handed to me on different days, and I can't recall the dates.

Q. There would be several days separating them, is that right?

A. I don't recall that. There might have been a month separating them, but I don't recall the dates on the checks.

Q. This started when, do you recall?

A. I don't know. Maybe—I don't even remember when it started.

Q. Would it be the first part of January, 1946 or the first part of the last quarter of 1946?

A. Well, it must have started—let me see. I think it started sometime in 1945 and didn't stop until in 1946.

Q. It didn't stop until 1946?

A. You see,—well, I don't recall the dates, but on the check, I think one of the checks was dated March, 1946. I mean they showed me the date.

(Testimony of Paul Chester Redd, III)

Q. 1946, in March, as you recall, is that right?

A. Yes, sir. Well, I don't even remember, you know, in that latter time, but it had my handwriting on it; so it is my check, I guess.

Q. Did you and Haymen ever room together?

A. No, sir.

Q. You only associated with one another around about, [99] is that right?

A. Yes; like going to a show or something like that.

Q. You rode in his car, did you?

A. Yes; once in a while.

Q. Did you ever have him point out to you where you could get some of these checks? A. No, sir.

Q. He just brought the checks to you and asked you to endorse them, is that right? A. That is right.

Q. And you endorsed them the first time without remuneration, did you, or did you not?

A. Without what?

Q. Without money, without payment to you?

A. Yes, sir.

Q. Did he pay you very much for endorsing the checks?

A. Well, I say he paid me maybe \$15.00 or \$20.00.

Q. He gave you \$15.00 or \$20.00 for endorsing a check? A. Yes, sir. Yes.

Q. One check? A. Yes.

Q. \$15.00 or \$20.00 he gave you for endorsing a check. Did you notice the figure on the check as to the amount indicated in money? [100]

A. I never did get to see the front.

Q. Never did look at that? A. No.

(Testimony of Paul Chester Redd, III)

Q. You don't know whether they were \$50.00, \$60.00, \$70.00, \$80.00, then, do you? A. No, sir.

Q. All you were interested in was the name on the little slip of paper, is that right? A. Yes, sir.

Q. And you signed on the back of the check the name that you observed on the paper? A. Yes, sir.

Q. Was it typewritten? A. No.

Q. Was the name typewritten or in longhand?

A. It was in longhand.

Q. Longhand. And you deciphered it and wrote that name on the back of the check; he gave you \$20.00 for that, did he?

A. Whenever I saw him again. I never saw him after I cashed the check until maybe the next week.

Q. Would he cash the check in your presence?

A. No, sir.

Q. Did you make an arrangement to meet him later on? A. No, sir. [101]

Q. Where would you meet him to get the \$20.00?

A. On the same corner.

Q. The same corner? A. Yes, sir.

Q. And, in the day time, afternoon?

A. You know, different—

Q. Evening or when?

A. Different times. I don't know; just at different times.

Q. Well, did you stand on the corner all the time, or did you have a day set and an hour or time to meet him?

A. I didn't have no certain day.

(Testimony of Paul Chester Redd, III)

Q. Then, that was a hangout of yours on that corner, was it?

A. Just right next door to my house. I hung out there all the time.

Q. That is right. And he drove up and found you there?

A. Yes.

Q. And that was the time he gave you the check?

A. Yes.

Q. In all, how many checks do you think that he gave you since last March, Mr. Redd?

A. I can only remember—since last March, he hasn't given me any since last March. [102]

Q. I thought you stated it possibly started some time last March.

A. I didn't say last March. I said it possibly started in January, 1945.

Q. 1945?

A. Yes; that is what I said.

Q. You got some checks?

A. I don't know. I said, "possibly." You asked me when. Since I can't remember the date, I just started from where I remembered.

Q. I asked you a question if you can remember how many checks you received?

A. In all the time?

Q. All together.

A. Well, I don't think that I had received over three or four.

Q. Well, you only received three or four, then, all this period of time, is that it?

A. I said I didn't think I did. I am not sure.

Q. And you got some money on each one of these checks, is that right?

A. Yes, sir.

(Testimony of Paul Chester Redd, III)

Q. And he never paid you until the day after or a few days after, when you met him on the corner?

A. Whenever I saw him on the corner; yes. [103]

Q. And he would pay you, would he?

A. He would give me some money.

Q. He would give you some money, cash money? Give you cash money, would he?

A. Yes; it was cash.

Q. Did you ever see him in company with some women, some girls?

A. Sure. I would be going down the street and I would see him.

Q. Well, you were in the courtroom when some of these ladies testified, were you not? A. Yes, sir.

Q. And did you ever see him in their company at the corner?

A. No; not at the corner. He was always by himself.

Q. He was always by himself? A. Yes, sir.

Q. Always driving the car that you have described here? A. Well, not always.

Q. Did he get out of the automobile? Would he walk out to the corner or would he stop the automobile at the corner? A. Well, I mean we—

Q. Would you get in the car and ride with him then? [104]

A. No, sir. I would always sign it standing up there at the corner.

Q. Do you remember when you received the last check? A. No; I don't remember.

Q. Do you remember when you received the second check? A. No; I don't. I don't remember.

(Testimony of Paul Chester Redd, III)

Q. Do you remember whether or not Mr. Hayman was working at that time?

A. Yes; I think he was working, working at the rubber company, the Kirkhill Rubber Company.

Q. Some rubber company? A. Yes, sir.

Q. Were you working?

A. Well, I was working at a hospital.

Q. You were working in a hospital? A. Yes.

Q. What hospital?

Mr. Ritzi: I don't think that is material, if the court please.

The Court: Overruled. You may answer.

A. The General Hospital, Los Angeles County General Hospital.

Q. By Mr. Entenza: You worked there all day, did you? A. Working there all day.

Q. Day shift or night shift? [105]

A. I worked there part-time, Saturdays and Sundays.

Q. Part-time. You did not tell Mr. Hayman that you were going to be a partner of his, did you?

A. No, sir. I never thought of it that way. I mean—

Q. Did you ever get any monies from him besides the monies that you got on those checks?

A. Well, if I needed a package of cigarettes or something.

Q. A package of cigarettes? A. Yes, sir.

(Testimony of Paul Chester Redd, III)

Q. Did you ever know anything about where Mr. Hayman got these checks? Did he ever tell you?

A. I never even asked him.

Q. Never said a thing to you about it?

A. No. I never even asked him.

Q. Never asked him. You just signed the checks because he asked you to endorse them, is that right?

A. Because what?

Q. He gave you the check and asked you to sign your name and you did so, is that right? A. Yes.

Q. How old are you? A. I am 18 right now.

Q. What? A. I am 18 right now. [106]

Mr. Entenza: 18 years old. That is all.

Redirect Examination

By Mr. Ritzi:

Q. Did the defendant ever ask you to go out and steal mail from mail boxes? You can answer that yes or no.

A. No. No; he never asked me to.

Mr. Ritzi: All right; that is all.

Q. By Mr. Entenza: Did you ever drive to San Diego with him? A. No; I didn't. No; I haven't.

Mr. Entenza: That is all.

Mr. Ritzi: That is all. May this witness, Paul Redd, be excused?

The Court: Is there objection?

Mr. Entenza: No objection.

The Court: You are excused from further attendance, Mr. Redd.

JACKSON H. MARTIN,

called as a witness on behalf of plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Jackson H. Martin. [107]

Direct Examination

By Mr. Ritzi:

Q. Mr. Martin, do you know the defendant in this case, Mr. Hayman? A. I have seen him before.

Q. What was the occasion of seeing the defendant?

A. The first time is when he came into my headquarters down at Sixty-second and San Pedro Street.

Q. And what happened then?

A. The first time he came in he made a small purchase, I can't remember what it was. But I definitely remember seeing the man. I can remember the man coming in and buying something. The day following he came in with a check which I cashed.

Q. Did he make a purchase the following day?

A. He did.

Q. What was the purchase?

A. Two bottles of Kings Treasure, Scotch-type whisky.

Q. You say he tendered you a check in payment?

A. That is right.

Q. Now, I show you a check drawn on the Treasury of the United States, payable to Samuel T. Thompson, in the sum of \$100.00. Have you ever seen that check before?

A. Yes. This a photostat of the check I cashed. [108]

Q. You cashed that check for the defendant?

A. That is right; yes, sir.

(Testimony of Jackson H. Martin)

Q. Did the defendant state to you that he was Samuel T. Thompson. A. That is right. I asked him.

Q. How was the cashing done? You say he made a purchase. What did you do, give him the change?

A. No. I always cashed the check first and counted out the full amount, which was \$100.00—I remember that distinctly—and gave him back a \$10.00 bill and the change from it I don't remember. It ran \$8.45.

Q. You mean for the purchase?

A. That is right.

Q. And then you did cash this check for him?

A. I did.

Q. He told you he was Samuel T. Thompson?

A. He told me he was Samuel T. Thompson.

Q. Did he tell you he was recently discharged from the Army and this was his mustering-out pay?

A. Yes. I noticed it was mustering out pay and I asked him if he had just gotten out of the service. He said, "Yes." And then I asked him at this time if it was his check and he said it was his check, again.

Q. By the way, you saw the two ladies who testified on the stand here, two colored women. Were they ever in [109] your store cashing checks?

A. Yes. I still have a photostat of it.

Q. You say they have been in your store cashing checks. Were those checks good or bad, do you recall?

A. They were bad.

Mr. Ritzi: They were bad.

Mr. Entenza: That is all?

Mr. Ritzi: Yes.

(Testimony of Jackson H. Martin)

Cross Examination

By Mr. Entenza:

Q. Was this check cashing on the part of the women before Mr. Hayman went into your place or after?

A. It was before.

Q. While he was in there on this day was he accompanied by anyone at all? A. He was not.

Q. Did you see him sign that name on that check in your place? A. I did not.

Q. You did not. He merely showed you the signature and the check; you inquired of him about it and gave him the Scotch, but you gave him the cash first?

A. That is right.

Q. And he verified by word of mouth that that was his [110] signature? A. That is correct.

Q. You remember of having asked him that?

A. I do, definitely.

Q. And that was satisfactory to you, was it? It was a large check.

A. I learned all too late that it was not.

Q. You sold him some Scotch on this day for \$8.00 and something? A. Domestic Scotch.

Q. That was a \$10.00 bill out of \$100.00?

A. That is right. I gave him \$10.00.

Q. You gave him \$10.00? A. Yes.

Q. And he made the purchase out of a \$10.00 bill; you gave him a \$10.00 and \$2.00 change, whatever it was, after he made the purchase of Scotch whisky?

A. That is correct.

(Testimony of Jackson H. Martin)

Q. You never made any further inquiry as to his identity, who he was, or anything of the kind?

A. No.

Q. Never asked him for a card? A. No.

Q. A driver's license or anything?

A. No. [111]

Q. Your liquor store is located where?

A. Sixty-second and San Pedro Streets. That is in Los Angeles.

Q. I believe you testified in answer to a question of the Government's attorney that these women who testified this morning that you observed on the stand, at different times had been in your place and cashed checks?

A. They had, one check.

Q. One of them or one check? A. One check.

Q. One check. A. That they cashed.

Q. Were they together at that time?

A. They were.

Q. Did they make a liquor purchase at that time?

A. I can't recall.

Q. In that instance you recall that they endorsed the check in your presence?

A. I don't believe they endorsed it—no; they didn't endorse the check in my presence.

Q. They did not? A. No.

Q. Then you cashed a check from these women about the same as you cashed the check for Mr. Hayman, did you not? A. That is right. [112]

Q. Without having endorsed the check on the back?

A. Now, wait a minute. I said they didn't endorse the check in front of me; no.

(Testimony of Jackson H. Martin)

Q. That is what I say; they did not endorse the check in front of you. A. That is correct.

Q. In both instances, you recall that they did not endorse in your presence? A. Yes.

Q. The instance of the women and in the instance of the defendant Hayman? A. That is correct.

Q. How many checks has this man Hayman cashed in your place? A. One, that I cashed myself.

Q. Pardon? A. One check is all.

Q. Is that check in evidence here?

A. Samuel T. Thompson.

Q. Did you ever cash another check?

A. For him?

Q. Yes. A. No.

Q. You recall him being in there any other time?

A. I recall him being in. I think it was the day [113] before. It was either one or two days before that he came in the store. What he purchased at that time I didn't remember, but he came back a second time and I did cash the check.

Q. The second time it was this \$100.00 check?

A. Yes. On the other checks you were referring to, the women, they were in before him.

Q. And the first time that he came in the place he merely made a purchase from the pocket?

A. That is correct.

Q. Instead of tendering a check in payment, is that right?

A. Yes; if I am not mistaken. I think it was beer. I am not sure.

(Testimony of Jackson H. Martin)

Q. Would you recall or would you remember at all on this occasion whether or not he tendered you a check from a rubber company and you cashed it, a regular check from the rubber company by which he was employed?

A. The first time?

Q. Yes. A. I don't recall. I cannot remember.

Mr. Entenza: That is all.

Redirect Examination

By Mr. Ritzi: [114]

Q. By the way, what was the date or about the date that this was cashed?

The Court: "This" means what?

The Witness: What was cashed?

Mr. Ritzi: This particular one, the \$100.00 check.

A. Samuel T. Thompson. It was around the middle of March. I would say between the 15th or 16th and the 20th, perhaps a little earlier than that. I would say between the 10th and 20th. It is rather hard for me to remember that far back.

Q. However, it was in March?

A. It was in March; yes.

The Court: You have been referring to Exhibit 4 for identification?

Mr. Ritzi: Yes. And might it go in evidence, your Honor? That is all.

The Court: Exhibit 4 for identification is offered into evidence. Is there objection?

Exhibit 4 for identification is received into evidence.

Mr. Ritzi: Mr. S. Kendall Gibson, is he here?

S. KENDALL GIBSON,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name. [115]

The Witness: S. Kendall Gibson.

Direct Examination

By Mr. Ritzi:

Q. Mr. Gibson, where were you employed in March of 1946? A. Goodwin Shoe Store in Hollywood.

Q. Do you know the defendant?

A. I have seen him before.

Q. Did the defendant ever come in your store?

A. Yes, sir.

Q. What was the occasion?

A. Do you want me to recite the occasion, what happened when they came in?

Q. Yes; if you would, please.

A. One of the ladies here, one of the women here on the stand, Dorothy McClain is the name she gave, I believe—she came in and she was accompanied by the defendant and another man; and she said that she would like to buy some shoes for her husband who was in camp; and she said that this defendant wore the same size as her husband and that he would try the shoes on, which he proceeded to do, and bought, as I remember, three pair of shoes and a pair of slippers.

Q. Was a check tendered to you for payment? [116]

A. Yes.

Q. Do you recall the amount of that particular check?

A. It was \$280.00 some odd. I remember that.

(Testimony of S. Kendall Gibson)

Q. I will show you Government's Exhibit No. 2 for identification—

By the way, may this go in evidence, if the court please? That is the \$282.50 check. Counsel has stipulated that; although it is only a photostat, it may go in as the original.

The Court: No objection? Exhibit 2 for identification is received into evidence.

Q. By Mr. Ritzi: I show you a check made payable to Lt. Charles A. Wilbun in the sum of \$282.50 and ask you if that was the check that was tendered to you in payment of the shoes? A. Yes, sir.

Q. I show you also a slip made out by the Goodwin Shoe Company or made out in the name of the Goodwin Shoe Company for a purchase. Have you ever seen that before? A. I made this check out.

Q. What is it? Does that cover the purchase at that time? A. That covers the purchase of—

The Court: Is that document identified here?

Mr. Ritzi: I think it is, your Honor. It is Government's Exhibit No. 5. I believe it was for identification. [117]

The Court: According to my notice, Exhibit 5 is in evidence, the sales slip.

Mr. Ritzi: Yes; it is Exhibit 5. Apparently it is in evidence, your Honor.

Q. Is that the sales slip that covered that particular purchase? A. Yes, sir.

Q. I show you a pair of shoes and ask if you can identify those particular shoes?

The Court: Is that Exhibit 3 for identification?

The Clerk: Yes, your Honor.

(Testimony of S. Kendall Gibson)

Mr. Ritzi: It is marked here No. 5 in evidence, your Honor.

The Clerk: It should be 3 for identification.

The Court: I just wanted the record to show what pair of shoes you were speaking about.

Mr. Ritzi: Yes, your Honor.

A. Yes; that is the pair of shoes that is designated by this sales slip here, 101 10C.

Q. Is this the pair of shoes that was tried on the defendant at that time?

A. Well, I couldn't say as to that. I mean they are exactly the same size and the pair of shoes that the woman purchased at the time.

Q. Is that the same pair of shoes as shown by the [118] sales slip? A. Yes.

Q. Was this check endorsed in your presence?

A. Yes, sir.

Q. Do you recall? A. Yes, sir.

Q. "This check" I mean it is the Wilbun check for \$282.50. A. It was.

The Court: That is Exhibit 2?

Mr. Ritzi: Yes.

Q. Who endorsed this check?

A. That woman that was on the stand here. I believe her name was Dorothy something, Dorothy McClear—what was her name, Dorothy McClear?

Q. Dorothy McClain.

A. McClain, yes. I forgot her name.

Q. And when you cashed this particular check for her for this purchase what was done with the rest of the money or the change; was that given to her?

A. That was given to her.

(Testimony of S. Kendall Gibson)

Q. By the way, you were what in that store at that time; were you a salesman or the manager?

A. I was the manager at that time.

Mr. Ritzi: I think that is all. [119]

The Court: We will take the afternoon recess at this time. You may step down.

(Short recess.)

Mr. Ritzi: If the court please, the Government moves that No. 3 for identification, which happens to be these shoes, be received into evidence.

Mr. Entenza: I have no objection.

The Court: Exhibit 3 for identification is received into evidence.

Q. By Mr. Ritzi: Mr. Gibson, those particular shoes were fitted to the defendant at that time did you state?

A. Yes, sir.

Mr. Ritzi: I think that is all with Mr. Gibson, your Honor.

Cross Examination

By Mr. Entenza:

Q. Mr. Gibson, how many people were in the store on that day, as you recall, connected with this party that made the purchase of those shoes?

A. I wouldn't have the slightest idea.

Q. Do you remember if there were two?

A. Oh, we had a number of people in the store.

Q. Well, I did not mean the entire custom group that you had in there, but in this party that had the \$280.00 some odd check? [120]

A. A party of three.

(Testimony of S. Kendall Gibson)

Q. A party of three? A. Yes.

Q. Two women and one man, or two men and one woman? A. Two men and one woman.

Q. Do you recognize this defendant as being one of the men? A. I do.

Q. This was the man, was it not, that tried the shoes on? A. It was.

Q. And did the other one try the shoes on, too? A. Yes.

Q. Both parties tried shoes on. Did you say "yes"? A. Yes. Yes, sir.

Q. Do you have ladies' and gentlemen's shoes in that store? A. No ladies.

Q. No ladies' shoes? A. No.

Q. So the ladies tried no shoes on. They were seated there, were they? A. One lady was seated.

Q. One lady was seated there while the two men tried shoes, is that right? [121] A. Right.

Q. Did you help serve them? A. I did, sir.

Q. And did you have another employee also serving them? A. No.

Q. You took charge of both customers on this occasion? A. That is right.

Q. He tried on several pair of shoes and among them was this suede and some other kind of shoes, leather shoes?

A. That is right.

Q. When the shoes were found satisfactory to both buyers, do you remember of wrapping them up in a package?

A. Yes; they were wrapped in a package and delivered—two packages.

(Testimony of S. Kendall Gibson)

Q. Two packages? A. Yes.

Q. One package being given to one party and the other package being given to the other?

A. Yes; that is right.

Q. Do you remember a conversation being carried on at the time of the trying on, any conversation that you recall?

A. Nothing further than I have already stated. Would you like me to repeat that? [122]

Q. No; it is not necessary. I remember that. I thought possibly I could recall to your mind the fact that one of them said, "I will pay you back," or "I will pay you for these shoes as soon as we have an opportunity"?

A. Now that you bring it up, I can verify that to this extent: The defendant here, the woman purchased the shoes for him, as far as I knew.

Q. Yes.

A. And after the purchase had been consummated, I saw this other man that was there wanted a pair of shoes like this pair of shoes entered here in evidence, the suede shoes, and he was the one that made the remark that if she would buy them for him he would pay her back.

Q. Do you remember what her answer was?

A. Well, it seemed like she was arguing about it a little bit, but she did so. Apparently she paid for the shoes, anyway.

Q. After the shoes had been wrapped up and turned over to the respective buyers in respective packages, a check was then tendered to you, or was it tendered to you before? A. No; it was tendered afterwards.

(Testimony of S. Kendall Gibson)

Q. And you, as manager of the store, okayed the check, is that right? A. Yes, sir. [123]

Q. Was it your custom to okay the checks or any of the clerks if they happened to come in contact with the check? A. Yes.

Q. In this instance, you came in contact with it yourself and you okayed it? A. Yes, sir.

Q. And paid the difference to whom?

A. To the woman.

Q. Did you supply her with a pen or a pencil or indelible pencil or something to endorse the check, or do you recall?

A. I do not recall that, whether she used her own pen or a pen of the store there. There was a pen available there.

Q. Have you a place situated so it is very easy and handy for people to sign checks?

A. That is right. But the check was signed right in my presence.

Q. It was signed in your presence; you were standing, watching her sign it at that time? A. That is right.

Q. And she signed the name on it?

A. The name I saw her sign on there was the second name on the check, not the first one.

Q. The second name on the check? [124]

A. Yes, sir.

Q. And that was what name, as you recall now?

A. Gloria Wilbun.

(Testimony of S. Kendall Gibson)

Q. Gloria Wilbun. Did you have to go into the office to make sufficient change?

A. No; the transaction was consummated right at the counter there. We have a wrapping counter with the cash register there.

Q. Do you remember who took the money? Did the woman take the money or the man?

A. The woman took the money and put it in her bag.

Q. Put it in her bag. Did you notice any giving of money on the part of the woman to either one of these men?

A. No, sir.

Q. And that is the last time you have had occasion to see these people?

A. Until today; yes, sir.

Mr. Entenza: That is all.

Mr. Ritzi: That is all.

The Court: You may step down, Mr. Gibson.

Mr. Ritzi: Agent Wells.

JOHN E. WELLS,

called as a witness by plaintiff, being first sworn, was examined and testified as follows: [125]

The Clerk: Please state your name.

The Witness: John E. Wells.

Direct Examination

By Mr. Ritzi:

Q. Mr. Wells, what is your occupation?

A. I am an agent of the U. S. Secret Service, Treasury Department.

Q. How long have you been such an agent?

A. Five years.

(Testimony of John E. Wells)

Q. Were you in charge of the investigation of this particular case? A. I was.

Q. Was it investigated in conjunction with the Post Office Department? A. Yes, sir; it was.

Q. Did you apprehend the defendant?

A. I was one of three agents who apprehended the defendant.

Q. You have seen Government's Exhibit No. 3 in evidence, I believe, which is that pair of shoes. Have you seen those shoes before? A. Yes, sir.

Q. And where?

A. It was on November 6th, the date that we arrested [126] the defendant. He was wearing the shoes at the time.

Q. And at the time of his arrest did the defendant make a statement?

A. He would make no admissions.

Mr. Ritzi: No admissions. That is all.

Mr. Entenza: That is all.

The Court: Step down.

Mr. Ritzi: Now, if the court please, if the Government has neglected to introduce any of these documents heretofore introduced for identification, it moves that they now be introduced. I think they are all in evidence.

The Clerk: My record so shows.

Mr. Ritzi: The clerk's record so shows that they are all in evidence.

The Court: Very well. All the Government exhibits for identification, if not heretofore received, are now received into evidence.

Mr. Ritzi: If the court please, the Government rests.

D E F E N S E

HERMAN ROBERT HAYMAN

the defendant herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Please state your name. [127]

The Witness: Herman Robert Hayman.

Direct Examination

By Mr. Entenza:

Mr. Entenza: Mr. Hayman, speak loud enough for the counsel on the other side of the table from me to hear you. Where do you live?

A. 1535 East 49th Street.

Q. How long have you lived there?

A. About 18 years.

Q. Are you residing with anyone else at that place?

A. With my people; yes.

Q. Are you residing with anyone there, your mother, your father or your children?

A. Yes; my people, my mother and father.

Q. Your people. Your family live there?

A. Yes.

Q. You have listened to the evidence, of course, of the various witnesses the Government has placed upon the stand against you relative to some checks and the passage of those checks, the pointing out of the checks in mail boxes. I ask you to identify these witnesses, if you can. The first witness on the stand was Mrs. Jackson, is that right? A. Yes, sir.

Q. And she testified that you drove around with her [128] to various parts of the city and pointed out mail boxes with Government checks in them, and you

(Testimony of Herman Robert Hayman)

drove further up the street, she got out of the car, went into the mail box and took the check specifically pointed out by you. How do you reconcile that statement against you? A. Well, it is wrong.

Q. If it is wrong—well, that requires a little further answer. How do you mean wrong? Did you drive around with her?

A. No; not to take any checks or anything.

Q. You never drove around with her?

A. Well, I have taken them to San Diego when her husband was there. They, you know, chipped in on the gas to go up there.

Q. You say you took she and her husband with you?

A. Yes.

Q. Did you take she and her husband around on these various trips that she alleges that you drove her to, that is, apartment houses and residences and mail boxes?

A. No; I didn't.

Q. Did you ever at any time point out a check to Mrs. Jackson and have her to get out of your car and pick up that check? A. No.

Q. You are sure about that? [129]

A. I am positive about it.

Q. You are positive about it. And did you give to Mrs. Jackson at any time an identification card by which she might be able to cash certain checks?

A. No; I didn't.

Q. Did you drive her out any place during any of these periods of visitations to liquor stores or otherwise for the purpose of cashing a check?

A. No; not that I can remember. The only time that I have driven Juanita anywhere was to Santa Monica and

(Testimony of Herman Robert Hayman)

to someone she was to see out there somewhere, her people or something.

Q. You drove her to Santa Monica?

A. Once; yes.

Q. Did she cash a check when she went to Santa Monica? A. I don't know.

Q. Where else did you drive her?

A. Well, another time, her husband and her, they went to the show, and several times they went to the show and I have driven.

Q. You drove her around without the husband sometimes, didn't you? A. Yes, sir; I have.

Q. In driving around town with this lady, Mrs. Jackson, do you recall her going into places and cashing [130] checks? A. Not that I know of.

Q. Did she ever show you any checks in her possession? A. She never has.

Q. How far away from your home did Mrs. Jackson live? A. I guess about 16 blocks.

Q. Did you go to school with her? A. I did.

Q. You have known her for a good many years?

A. Yes, sir.

Q. Did you have occasion to go into any mercantile establishment of any kind to make a purchase?

A. With her?

Q. With her, yes. A. No; I haven't.

Q. You never did go into a place with her?

A. Never.

Q. Did you go to San Francisco with her?

A. No.

(Testimony of Herman Robert Hayman)

Q. Did you go to San Diego?

A. To San Diego, yes.

Q. And on that occasion it was just a social trip, was it?

A. Yes.

Q. Did she seem to have money? [131]

A. Well, she and her husband did. I didn't see her with any.

Q. Some of these times, I believe you have testified that you drove around with her without her husband?

A. Yes; I said that I have.

Q. Well, did she give you any money for driving her around?

A. Well, she did that time I went to Santa Monica. Well, she bought me 10 gallons of gas.

Q. Bought you 10 gallons of gas. Did she give you any currency?

A. No; not then.

Q. Did she give you any currency on any other occasion?

A. Oh, to Val Verde one time. Well, her and her husband paid me \$5.00 for taking them to Val Verde one time.

Q. Where is her husband now?

A. In San Quentin.

Q. And did she make the payment to you or did he make the payment to you?

A. I think she had the money. She did.

Q. Did you drive them around in the car that has been identified as the Buick car or the Mercury?

A. The Buick.

Q. The Buick car. Did that belong to you?

A. My mother and I. [132]

(Testimony of Herman Robert Hayman)

Q. Family car, was it? A. Yes; it is.

Q. Do you remember the year the car was made?
Its model was what? A. '42.

Q. 1942. Did you meet them very frequently and drive them around? A. No; I didn't.

Q. Did you meet her very frequently? A. No.

Q. Did you know what her name was before she was married? A. I think it was Anderson.

Q. And did you go around with her socially at that time? A. No; I didn't.

Q. Where did she live? A. Then?

Q. Well, at any time during this last year.

A. Well, I don't exactly know her address, but it is on 55th. One house is on 55th near Holmes, and the other house is on—

Q. She testified that you went into her house quite frequently and brought some checks. Did you ever bring any checks to her home? [133] A. No.

Q. Or take any checks to her home? A. No.

Q. Did she ever come out to your automobile and find any checks? A. No.

Q. You mean to tell me, then, that you had no checks at any time? A. No.

Q. These Government checks? A. No.

Q. And you deny, then, that you pointed out any mail box checks that had been deposited there by someone and allowed the girls to take them, is that right?

A. Yes. I—yes.

Q. Did you ever sign your name on the back of any of these checks? A. No; I never.

(Testimony of Herman Robert Hayman)

Q. Did you sign your name anywhere else?

A. No; I haven't.

Q. Where it had to do with cashing a check, either a Government check or a private check? A. No.

Q. How old are you? A. 23. [134]

Q. You knew the other girl, didn't you? You knew the other girls that testified? A. Dorothy, yes.

Q. You knew Dorothy? A. Yes.

Q. How long have you known her?

A. Oh, about a year, a year and a half, something like that.

Q. She also testified that you pointed out checks to her and she got out of your car, picked checks up and cashed them and gave you part of the money.

A. Yes.

Q. Or at least, gave you all the money and you gave back part of it. You remember that evidence, don't you?

A. I remember that. It is not true.

Q. Is it true? A. No; it is not true.

Q. You never pointed checks out to that girl Dorothy?

A. No; I haven't.

Q. Never in your life? A. No.

Q. All the time that you knew her?

A. All the time that I knew her I haven't.

Q. Did you know anything about the fact that she did have many checks in her possession? [135]

A. Well, I heard something about it a little before she got picked up, and she had some sort of idea that I had told someone that she was doing checks or something.

(Testimony of Herman Robert Hayman)

Q. She had an idea that you told somebody about it?

A. Well, because she come and asked me. She said, "I thought you were pretty dirty for it." I said, "I don't know nothing about it." She said, "You are not smart. I heard that you told some officers or something that I was forging checks."

I said, "What would I want to tell anyone that for?" So, since then, why, she has been acting funny. I guess she still thinks that I told. I didn't know anything to tell. I said, "So how would I know anything?" She said, "This certain person." I wouldn't call any names. She seemed to think that he had told me about it.

Q. Did she ever give you any money?

A. Well, to take her places; yes.

Q. Well, how much money did she give you?

A. Well, enough to buy gas, five gallons of gas or ten gallons of gas.

Q. Would that be very frequently?

A. No; it wouldn't.

Q. Did you go out at night with her?

A. I went to the—I have went out with her to a party, her and her boy friends. [136]

Q. She had a boy friend? A. Several.

Q. Would you take the boy friend out, too?

A. Oh, yes; he would go.

Q. Did you go to some cafes?

A. No; we went to a house-party.

Q. Now, you testify that you never gave that girl any money, is that right?

A. Never gave Dorothy any money?

Q. Yes. A. No.

(Testimony of Herman Robert Hayman)

Q. Did you drive her up to a place to cash a check?

A. Once she cashed a check that I know of.

Q. Did she ever show you the check that she cashed?

A. No.

Q. Of the many checks that she had?

A. She never showed it to me, because she told me "to wait here a minute," and that day there was some money missing out of my car. I had about \$35.00 in my billfold and I put it in my glove compartment and locked the glove compartment. So I went in a place and when I came out the keys was still in my car. I guess she had taken it out. She made out like she hadn't. Her and I was arguing about it. She said, "Just take me on down." I said, "Okay." We were still arguing and she said, "Wait for me." And I said, [137] "Heck with you." So I went on. That evening she got picked up, which is the time she forged that check. So that is how I knew that she had forged the check, when she got picked up on that.

Q. She gave you some money then, did she?

A. No. She was in jail. They picked her up.

Q. Oh, she got in jail? A. Yes.

Q. And they claimed that you had told the officers something about she having checks in her possession?

A. I guess she has.

Q. Well, was this transaction after you had heard about she having checks and passing checks around town, or did you hear that she was passing checks around town?

A. Well, afterwards.

Q. That was after that?

A. Yes; after she had gotten picked up.

(Testimony of Herman Robert Hayman)

Q. There is some testimony here that you went into a liquor place and bought some Scotch liquor and tendered a \$100.00 check.

A. I have cashed a check in that liquor store before; yes.

Q. You cashed a check in that liquor store?

A. Yes; I have.

Q. What check? [138]

A. My own check from the Kirkhill Rubber Company.

Q. You made purchase of liquor on that check, did you?

A. Yes, sir.

Q. On the personal check that you had?

A. Yes; it was, but it was not Scotch because I don't like Scotch.

Q. Then he was lying about the purchase of the Scotch?

A. Yes, sir.

Q. And you did not tender a \$100.00 check to him at any time, did you?

A. No. The check was 70 something or, I think, \$74.00.

Q. \$74.00 was the check that you tendered to him?

A. Yes.

Q. And that was a check that you received from the rubber company where you were employed, is that right?

A. Yes. It was the Kirkhill Rubber Company.

Q. Had you been employed there a long time?

A. About a year and six months.

Q. About a year and six months?

A. Yes.

Q. Employed quite steadily, were you?

A. I was.

(Testimony of Herman Robert Hayman)

Q. Did you work day or did you work nights? [139]

A. Day.

Q. You worked day time. The testimony of one witness was that she went out to the factory and met you in the automobile. Do you recall that time?

A. I recall Dorothy coming to the factory.

Q. Dorothy coming to the factory and meeting you on that occasion?

A. Yes, sir.

Q. Do you remember whether or not she cashed any checks on that occasion?

A. No. That was to look for one of her boy friends. Him and her had had some trouble and she wanted me to go around and look for him, you see. So I told her I couldn't, which I couldn't, because I had a dinner engagement that night, so I couldn't take her.

Q. You can't remember of ever having pointed any mail box out to any of these girls that testified against you this morning, can you?

A. No; I know that I haven't.

Q. You heard the testimony of the boy, the 18-year old boy—and what is his name, by the way?

A. Paul Redd, Junior something.

Q. Do you know Redd very well?

A. I know him; yes, sir.

Q. Known him a long time? [140]

A. Quite some time.

Q. Did you meet him on the corner?

A. No; I had never met him.

Q. Did you give him some checks to cash?

A. No.

(Testimony of Herman Robert Hayman)

Q. Never gave him a check in your life?

A. No. I knew his family well. As far as the trip that—yes; I know his family real well. The way he talks, as if I barely knew him.

Q. He testified that you met him on several occasions and you promised to give him \$15.00 or \$20.00, and on another occasion you would bring him \$15.00 or \$20.00, meeting him at a corner.

A. The reason he says that, because he had heard that I had put out that he had forged some checks, and he didn't like it at all, what I had told about him. And he said that I had talked about Juanita doing checks, and Chestine, but I was going to have him go to jail. He said if it was like that, I was going to jail with him, since I was dirty enough to say something like that about him. So he said he would fix me, that he would have me do some time with him for telling them some kind of a story like that.

Q. Did he tell you that very recently?

A. He told me that in the evening yesterday.

Q. He said he was going to put you in jail; if he went to jail, you were going to jail? [141]

A. Yes.

Q. There is some testimony here, further, that he had known you since 1945. Had you known him that long?

A. Yes, sir.

Q. And you had no money dealings or check dealings with him in your life?

A. Yes; I have had money dealings with him.

Q. You gave him money sometimes?

A. He gave me money.

Q. He gave you money? A. Yes.

(Testimony of Herman Robert Hayman)

Q. On what occasion was that?

A. Well, I had a Ford car and he bought it from me.

Q. He bought a Ford car from you? A. Yes.

Q. And that is where the exchange of the money took place? A. Yes, sir.

Q. How long ago was that?

A. About four weeks ago.

Q. About four weeks ago. Do you two live very far apart? A. About nine blocks.

Q. About nine blocks apart? A. Yes. [142]

Q. During this year and a half or more since 1945 you have met him quite frequently, is that right?

A. No; I haven't.

Q. You never took him along on these rides with these women, did you?

A. He went to San Diego, with his mother's permission.

Q. Did you take any of these girls any other place in the State of California than San Diego? I am talking about the girls who testified against you now?

A. No; I haven't.

Q. And you have never—you repeat that you have never given them a check nor pointed out a check to them in your life? A. I know that I haven't.

Q. And you know something about the evidence here relative to a pair of shoes?

A. Yes; I know about that.

Q. You must remember what the shoe man Gibson said, don't you? A. Yes; I know about the shoes.

Q. You know about the shoes? A. Yes.

(Testimony of Herman Robert Hayman)

Q. Well, that is worthy of explanation. How did you get hold of the shoes?

A. Well, Dorothy called me to take her to Hollywood. [143] First, she wanted a dress, so I taken her, and I just parked my car and let her go over there and get the dress, but she didn't get one.

Q. She was going over to get a dress?

A. Yes; and something happened. I don't know what it was. Her and this other fellow went over to get the dress. So I was looking at the shoes in the shoe store. So then they came over there and I showed the other boy the shoes and asked him how did he like them. He said he liked them. So we went in and I said, "I sure would like to have a pair of shoes like that." So she—

Q. Suppose you take your hand down from your mouth now and give us a clear picture.

A. She said—she asked me did I like them. I said, "Yes." She said, "Do you want a pair?" I said, "Well, sure." So I said, "Why did you ask me for?" She said, "Well, do you want them?" I said, "Yes." She said, "Well, I will get them for you." I said, "You are not going to get me a pair of shoes?" She said, "Yes; I am getting you a pair of shoes." I said, "Yes."

I was wondering then what in the heck was wrong with her being so good. So we went in. I tried on one pair of shoes and I didn't like them. I tried on another pair of shoes and I came across a pair that they had and I liked those best. [144]

Q. Shall I show you these shoes and see whether or not you recognize them? I think it is No. 4.

Mr. Ritzi: 3.

(Testimony of Herman Robert Hayman)

Q. By Mr. Entenza: Do you recall trying those shoes on?
A. Yes; those are the ones.

Q. Do you recall having them taken off of your feet by the officers?
A. Yes; they are the ones.

Q. Did you announce to the officers at that time how you came into possession of these shoes?

A. No. I told them—I admitted getting them.

Q. You admitted buying the shoes in the place, or someone buying them for you?

A. I didn't say who. I said they were gotten there.

Q. They were gotten in this place in Hollywood, is that right?
A. That is what I told them.

Q. You do not deny that you were in that store at the time?
A. No.

Q. The girl had a check and purchased the shoes for you and another young man?

A. Yes. I got the pair of shoes I wanted and he was trying on some slippers or something. I had to make a phone [145] call. I went out of the store and made the phone call. When I went to go back to the store they were in the car, you know. I could see them, so I went back to my car.

Q. You were not in the store when the cash transaction took place?
A. No.

Q. Or the change of the check?
A. No.

Q. No place on that appears in your handwriting?

A. No.

Q. You do not know anything about what amount of money she received back?
A. No; I didn't see her.

(Testimony of Herman Robert Hayman)

Q. And you don't know what size check she gave to Mr. Gibson?

A. No; I wouldn't have no way of knowing.

Q. You don't know anything about it? A. No.

Q. You had your shoes, you got into your automobile and put your shoes in a box, is that right? A. Yes.

Q. Where did you go from there?

A. Taken them home.

Q. You took them home? A. Yes. [146]

Q. Did they give you any money?

A. No; nothing but the money for the gas that was bought.

Q. The boy or the girl gave you no money, is that right? A. No.

Q. What time was this if you recall?

A. I don't remember.

Q. Was it in the afternoon, daylight, or was it in the evening, early evening?

A. It must have been in the evening.

Q. Well, you should have remembered. It was a pair of shoes she gave to you. You had already expressed yourself as being surprised that they were so liberal. I would assume you would remember that.

A. The reason I said it must have been in the evening was because my father was home when I got there and he works in the day.

Q. Then you identify it as being in the evening.

A. Yes.

Q. Well, was it a working day during the week?

A. I don't know.

(Testimony of Herman Robert Hayman)

Q. Were you off of employment at that time?

A. No. If it was the work day, it would have to be after four, after I got out. [147]

Q. After 4:00 o'clock? A. Yes.

Q. That was the time you ceased work, was that right?

A. Yes.

Q. And that place was the rubber company that has been mentioned here in evidence?

A. Yes; that is right.

Q. The cashing of these checks, that seems to be the question here that is very interesting. I wonder what check that is; is that one of the exhibits there?

A. This Thompson check for \$100.00.

Q. Do you recall anything about this check or any other check—any check that you know of the Treasury of the United States? A. No; I don't.

Q. Did you ever tear one of those envelopes open and take a check out and give it to the girls to cash?

A. No; I haven't.

Q. Then you did not have a lot of girls working for you, as have been supported here by some of the witnesses? A. No; I haven't.

Q. You are a married man, are you?

A. Yes; I am.

Q. Have a family? A. Yes. [148]

Q. Had nothing to do with these checks at any time?

A. No; I haven't.

Q. What you are testifying to here, of course, under oath, is supposed to be the truth and I wouldn't want you to testify other than telling the truth. I would say, for the benefit of counsel and the court, that I would ap-

(Testimony of Herman Robert Hayman)

preciate it if you would tell the absolute truth about this check transaction, if you know anything about it at all, any of these checks in the hands of any of these girls in check-cashing offices of the City of Los Angeles, in liquor stores, as has been testified here, and other mercantile establishments where checks have been cashed. The girls testified that you drove there, you placed your car in a parking lot, in some instances you parked it along the sidewalk and stayed there until they went in, on some occasions you went in yourself. Now, tell us the truth of that; did that really occur at any time?

A. No; it didn't.

Q. Did you ever go into any of the places these girls designated as having been the places that they cashed checks? Were you ever in there?

A. No.

Q. You do not remember having seen any of these girls cash any of these checks that have been placed in evidence here? [149]

A. No; I don't remember seeing them.

Q. I think there are four of them altogether.

A. No.

Q. You know nothing about these at all?

A. No; I don't.

Q. The check that you cashed in the liquor house was for how much money, do you recall? When you bought the liquor, and not the Scotch, you testified, did you say \$74.00?

A. I think it was.

Q. Was that a double week's pay?

A. For two weeks' pay.

Q. Or was that a week's pay?

A. For two weeks.

(Testimony of Herman Robert Hayman)

Q. For two weeks? A. Yes.

Q. You had been in there many times in that liquor store, had you not? A. No.

Q. Did he ever ask you to endorse a check in there, the rubber check that you had for \$74.00; that was endorsed by you because it was made out to you?

A. Well, I had to endorse it in there.

Q. You had to endorse it?

A. Yes. He had a pen and everything in there. [150]

Q. He gave you a pen and everything, and you endorsed the check in his liquor establishment and you went out and took along the liquor?

A. He either gave me a pen or a pencil.

Q. On that occasion, of course, you remember about him cashing the check in there. And do you know where the place is? Do you know where the location of that liquor place happens to be?

A. He stated it was on San Pedro. Was it San Pedro?

Q. Well, I am asking you. I am wondering whether or not you remember the place. You said you had been there two or three times. A. On San Pedro.

Q. San Pedro. Did you recognize the man who testified against you this afternoon?

A. Yes; I recognized him.

Q. He is the man that cashed your check and sold you the liquor?

A. Well, him and his wife, both, was there. I guess it was his wife. They both was there when I cashed it.

Q. He had a lady in the liquor store at the same time?

A. Yes.

(Testimony of Herman Robert Hayman)

Q. And that was the event that you told the police officer, was it not, Mr. Wells and others?

A. Yes. [151]

Q. You told them the story just about as you have told it to me? A. I told them. I told them.

Q. You told them that you never had anything to do with these checks, and neither did you point out any place for these girls to steal checks? A. No.

Q. You never cashed one of these checks in your life yourself? A. No.

Q. No one ever found any of these checks on your person or in your automobile? A. No.

Q. Or in your home? A. No.

Q. And your home was searched, is that right?

A. Just about tore up.

Q. You have had nothing to do with getting these girls together in a conspiracy to defraud these various people who had the checks in mail boxes by pointing the mail boxes out? A. No, sir.

Q. You don't know anything about how the checks got into the mail boxes if they got the checks out of there at all themselves, do you? [152]

A. No. And another statement the girl made. How would I know the check was in the mail box and tell them where to go? I am no mind reader. I wouldn't know. I have no way of knowing a check is inside a mail box. How would I know?

Q. I rather agree with you, but, nevertheless, that is the testimony against you; and they claim that you pointed out these mail boxes, and in some instances you drove direct, in most instances you drove at random

(Testimony of Herman Robert Hayman)

around the neighborhood. You do not know, then, why these girls gave the testimony they did?

A. I have an idea why Juanita did, because she thought I was trying to fix some other girl with her husband.

Q. Then this is a complicated matter with which the court is not particularly interested.

A. What I mean, you stated was there any reason.

Q. I am to blame for that myself in asking that question, probably. And that is your idea, that there is a little revenge against you, is that right?

A. Yes; there was. I am a witness to it.

Q. Did you ever go to school? A. Yes; I did.

Q. You are a graduate from high school?

A. Yes, sir.

Q. Lived in Los Angeles all this time? [153]

A. Yes; I have.

Q. Did you ever talk with Mr. Wells about this case?

A. Yes; I guess I talked to him.

Q. And other Federal officers, did you?

A. Yes; I have.

Q. You have told them that you had nothing to do with the passing of checks, is that right?

A. Yes; I told them that.

Q. They tried to identify your handwriting, did they, and you did give copies of your handwriting to them?

A. Yes.

Q. You have cooperated to that point and you have had handwriting experts to look at the signatures corresponding with your various letters and found that you had signed no checks, is that right? A. Yes.

Mr. Entenza: That is all.

(Testimony of Herman Robert Hayman)

Cross Examination

By Mr. Ritzi:

Q. You say you gave agents of the Secret Service your handwriting? A. Gave what?

Q. You said you gave agents of the Secret Service examples of your handwriting? [154]

A. Well, some of them. I thought they all was Secret Service. On some of those calls out there I gave my handwriting.

Q. You say you did give them samples of your handwriting? A. Yes, sir.

Q. The fact of the matter is you have been mixed up previously in some checks, haven't you?

A. Yes; and it still was not my handwriting.

Q. You have been previously convicted of uttering and forging checks, haven't you? A. Yes; I have.

Q. And the fact of the matter is that these particular identification cards you got printed in a little print shop in Main Street, between Third and Fourth Streets?

A. Dorothy got those cards printed.

Q. Dorothy got those cards printed? A. Yes.

Q. You did not go down and ask the man down there to print those cards?

A. She called me in the place. She asked me for some money. She asked me for some money to get the cards out, so I was asking her what she is getting all the cards for. She said it was for her club; that they was having a girls' club and they wanted the cards; and she even told [155] the fellow that. So she asked me to loan her some money and I didn't have no money at the time.

(Testimony of Herman Robert Hayman)

Q. Where was this store, now, exactly on Main Street? A. I wouldn't know. I can't remember.

Q. Oh, you don't remember where it was?

A. No.

Q. This position that you had, you were fired from that position out there at the Kirkhill Rubber Company?

A. Yes, sir.

Q. Isn't that correct; and the reason you were fired was because you took too much time off during the day time, wasn't it? A. No; it wasn't.

Q. What was your position out there?

A. I was a truck driver.

Q. You were a delivery boy in your automobile, delivering parcels; isn't that a fact? A. Yes.

Q. Isn't that true? A. Sometimes.

Q. So that you had quite a bit of time during the day time to contact these various girls?

A. No; I didn't, because the only time I used my car was when I got ready to go home and I would take the mail then.

Q. You were out at the plant a great deal during the [156] day time?

A. Yes; with someone on the truck with me. Another fellow was on the truck.

Q. You used the car in delivering parcels also, didn't you?

A. Not until after 4:30. I never delivered mail in my car until after 4:30.

Q. Now, let us get back to this shoe store deal. You say that only this one pair of shoes was fitted to you at the shoe store? A. No. I tried several pair.

(Testimony of Herman Robert Hayman)

Q. The fact is you bought all of the shoes, didn't you, or had them all bought? A. No; I didn't.

Q. They were all the same size, weren't they?

A. They could have all been the same size, as far as I know. The other boy is probably the same size.

Q. The fact of the matter is the other boy had a size 9C and you purchased three pairs of shoes with a size 10C; isn't that correct? A. 9C and 10C?

Q. Yes. I will show you this slip. The slip shows three 10C's, which is the same size as those shoes down there?

The Court: By "those shoes down there," you are re- [157] ferring to Exhibit 3?

Mr. Ritzi: Exhibit 3, your Honor.

Now, the fact of the matter is you bought all of the three pair of those 10C's? A. I didn't buy any.

Q. Oh, you didn't buy any?

A. The girl bought them.

Q. Bought them for you?

A. No; she didn't buy them for me.

Q. Who were they bought for?

A. Well, I guess her boy friend or someone. They wasn't bought for me.

Q. This pair of shoes here is yours, isn't it?

A. Yes.

Q. These shoes were bought out at the Goodwin Shoe Company?

A. That one pair was bought for me. She gave them to me, that one pair.

Q. Her boy friend also had size 10C, then?

A. He could have.

(Testimony of Herman Robert Hayman)

Q. You tried on all the pairs of shoes, didn't you?

A. I tried on several shoes.

Q. It wasn't three pairs you took; you took one pair?

A. I didn't take any out at the store.

Q. All of the shoes that were fitted to you and that [158] fitted you, you took; isn't that a fact?

A. No.

Q. The fact of the matter is, also, you never left the store?

A. Yes; I did.

Q. Why did you leave the store?

A. I had to make a phone call.

Q. And the fact is that there are two public telephones in the shoe store, isn't there?

A. It could have been. I don't know.

Q. Didn't you see them? A. No.

Q. Weren't they in plain sight?

A. I didn't see them. I saw one phone. It was the phone at the desk, but I didn't see any other one.

Q. That was not a public phone? A. No.

Q. And the fact is, further, that all of you left the store at the same time, is it not? A. No.

Q. That is not true? A. No.

Q. By the way, how much were you earning out there at the Kirkhill Rubber Company a month?

A. Oh, sometimes it averaged from—well, some [159] checks was \$74.00 and I have had checks for \$80.00 some odd dollars.

Q. A month? A. No; for every two weeks.

Q. So that means you made about, we will say, \$150.00 a month out there, your average? A. Yes, or more.

(Testimony of Herman Robert Hayman)

Q. Less your social security tax, etc.; maybe it was \$135.00 a month?

A. No; I have made more than that. You see, I had overtime also.

Q. So your company check averaged about \$150.00 a month?

A. I couldn't tell that.

Q. Well, that check you cashed at the Martin Liquor Store, you claim you cashed for \$70.00 some dollars; that was for two weeks' pay?

A. Yes, sir.

Q. So then, that will be \$148.00 a month?

A. But I mean you couldn't add up what I made a month by that check, because I told you my checks varied.

Q. How much did you pay on your automobile a month?

A. \$113.00.

Q. \$113.00 out of a salary of about \$150.00?

A. It was the family's car. My mother helped pay [160] for it.

Q. You were to make the payment on it; isn't that a fact?

A. We both were.

Q. And isn't it a fact that you told Dorothy McClain that you were averaging over \$900.00 a week in the theft of these checks?

A. You asked her that and she told you no.

Q. Or was it Juanita Jackson you told it to?

A. It was neither one.

Mr. Ritzi: I think that is all, your Honor.

Mr. Entenza: That is all.

The Court: You may step down.

Mr. Ritzi: I will call Mr. Gibson again, please.

The Court: Has defendant rested?

Mr. Entenza: Defendant rests.

S. KENDALL GIBSON (Recalled),

recalled as a witness by plaintiff in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ritzi:

Mr. Ritzi: Mr. Gibson, you have been previously sworn.

Q. Are there two telephones in the Goodwin Shoe [161] Company? A. Yes, sir.

Q. Are they public phones?

A. One is a pay station and the other is a phone that is used by the public.

Q. Are they in plain view?

A. Yes; all three of them.

Q. Were all of these shoes fitted to the defendant, these three sized 10C's? A. They were.

Q. And did the defendant at any time during the purchase of these shoes leave the store?

A. Not to my knowledge. I didn't see him while the shoes were being wrapped up, but he carried them out of the store.

Q. He carried them out of the store. And did all of the individuals leave together or did he leave first?

A. They left together.

Mr. Ritzi: They left together. That is all. That is all, your Honor.

The Court: Both sides rest?

Mr. Entenza: The defendant has rested, if the court please, and I take it the Government has closed its case.

Mr. Ritzi: That is correct, your Honor. Does the court care for argument? [162]

The Court: Do you wish to argue the matter, gentlemen?

Mr. Ritzi: Does the court desire argument?

The Court: I will hear from the defendant, if you have anything to say, Mr. Entenza.

Mr. Entenza: I do not feel as though I am capable of doing much arguing in this case, some way or another, with the array of evidence against the defendant and my case resting solely upon his word. The court is able to perceive from his actions as to whether or not he thinks the evidence supports the charge.

I will waive argument if the Government waives argument.

Mr. Ritzi: I will waive argument, if the court please.

The Court: Very well, gentlemen. The waiver of the jury which has been signed also covers the waiver of any special findings of fact?

Mr. Ritzi: Yes, your Honor.

The Court: As to count 1 of the indictment the court finds the defendant guilty as charged; as to count 2, the court finds the defendant guilty as charged; as to count 3, the court finds the defendant guilty as charged; as to count 4, the court finds the defendant guilty as charged. The court finds the defendant guilty as charged in count 5 of the indictment. The count finds the defendant guilty as charged in count 6 of the indictment.

The defendant is ordered committed to the custody of the marshal pending sentence. I will refer this case to [163] the probation officer for pre-sentence investigation and report, and continue the matter for a hearing of that report and sentence until January 20th at 1:30.

The probation officer's report will be in the hands of the clerk on the Friday preceding the sentence, where counsel for either side may examine it.

Mr. Entenza: Do I understand, if the court please, 1:30?

The Court: On the 20th.

Mr. Entenza: On the 20th of January, sentence will be imposed after having heard the report?

The Court: Yes, sir.

(Further proceedings in this matter were continued until Monday, January 20, 1947, at 1:30 p.m.) [164]

Los Angeles, California, Monday, January 20, 1947, 1:30 P.M.

(Case called by the clerk.)

The Court: Herman Hayman, you stand before the court for sentence for the offenses charged in six counts of the indictment, of which you have been found guilty after trial by the court. For the offense charged in count 1 of which you have been convicted the maximum punishment is 10 years imprisonment and fine of \$5,000; in counts 2, 3, 4, and 5 the maximum punishment is 10 years imprisonment and a fine of \$1,000 on each count. Count 6, the maximum sentence is two years imprisonment and fine of \$10,000. What have you to say as to why the maximum sentence should not be imposed upon you in this case?

The Defendant: I have two kids and my wife. She is pregnant, going to have another kid, and I would like to look after her, you know, and take care of my family.

The Court: What is the attitude of the Government?

Mr. Ritzi: If the court please, I have conferred several times with the Post Office authorities and members of the Secret Service concerning this particular case. It

is not necessary to review the facts because the matter was tried before your Honor. You saw the evidence, or saw much of it.

The Post Office authorities have worked on this case [166] for months; so has the United States Secret Service. It has been estimated that the Government—or that this defendant, rather, had stolen over 200 checks; that he has gotten somewhere between \$20,000 and \$30,000 out of these checks, and those are only Government checks.

The Court: Were those checks to veterans?

Mr. Ritzi: I think that some of them were veterans' checks, some of them were probably family allowances, and some of them were refunds on income tax returns, etc.

But the Secret Service tells me that this is the largest individual case they have had out here in years. Not only that, but this defendant has gotten numerous girls, into this thing—Dorothy McClain and Juanita Jackson, who testified here before your Honor. Juanita was just given 10 years for her part in this by Judge Hall. Dorothy McClain, I don't think she has come up for sentence yet. Chestine Thomas was just given five years for the defendant giving her those checks to forge. Ethel Delaney was just picked up in Detroit. She is going to be brought out here for prosecution. Paul Redd who testified here, we have not determined yet what to do with him. Frankly, I do not think he will be prosecuted. And Jerry Healey, I think his name is, was just given three years.

All of these were individuals who went into this thing because of the prompting of this particular defendant. There [167] are three or four other individuals involved, too. They will ultimately be apprehended and brought before the court if possible. One of the girls who is here

came down from Tehachapi to testify. She was given one to 14 years in the State court because of the one check that this defendant has given her.

Frankly, your Honor, I think the case is unusually serious and I most heartily return a recommendation that the probation be not considered.

The Court: Anything further?

Mr. Entenza: Counsel has nothing to say, if the court please. I believe the statement of the probation officer rather explained the case most fully. You will recall, yourself, from the trial of the case the facts set out.

I have no argument to make, your Honor, in behalf of this defendant, other than, as he expressed to the court a moment ago, he has, after all, two children and one coming. I hardly think that that is amply sufficient to really guarantee probation, of course.

The court is well familiar with the evidence, more so than I am. However, I do not think he should be so severely punished, but a sentence ought to be given. We understand that.

The Court: It is the most serious violation of the United States mails that has come to my attention for quite [168] a while. Is there anything further, gentlemen?

Mr. Entenza: Nothing further.

Mr. Ritzi: Nothing, your Honor.

The Court: It is the judgment of the court, Herman Hayman, having been found guilty of the offenses charged in the six counts of the indictment, that you are hereby committed to the custody of the Attorney General of the United States or his authorized representatives for imprisonment for the period of 10 years in an institution to be selected by the Attorney General of the United States for the offense charged in count 1 of the indictment; for

the period of 10 years for the offense charged in count 2 of the indictment; for the period of 10 years for the offense charged in count 3 of the indictment; for the period of 10 years for the offense charged in count 4 of the indictment; for the period of 10 years for the offense charged in count 5 of the indictment.

It is further ordered and adjudged that the 10-year period of imprisonment imposed under counts 1 and 2 shall run consecutively. In other words, you will serve the entire period of imprisonment of 20 years; and that the 10-year period of imprisonment imposed under counts 3, 4, and 5 of the indictment shall commence and run concurrently with the 10-year period imposed under count 2 of the indictment. [169]

It is further ordered that the defendant pay to the United States of America a fine of \$10,000 for the offense charged in count 6 of the indictment and be further imprisoned until such fine is paid or until he shall be discharged as provided by law.

You are now remanded to the custody of the United States Marshal to serve your sentence.

Mr. Ritzi: If the court please, I believe that there is a mandatory fine, isn't there, on those other counts? From a reading of the rather peculiar statutes, it may be necessary to fine him a dollar on each of those other counts. I have not read the statute for some time but I think there is a peculiar wording of it, a mandatory fine.

The Court: Yes; there is a mandatory fine on each of the five counts, the first five counts.

It is the further judgment of the court, Herman Hayman, that as to the offense charged in count 1 of the in-

dictment, in addition to the period of 10 years imprisonment, you shall pay unto the United States of America a fine of \$2,000, and that you be further imprisoned until the fine is paid or until you are otherwise discharged as provided by law;

That for the offense charged in count 2 of the indictment, in addition to the period of 10 years' imprisonment imposed, you are to pay a fine unto the United States of America of \$2,000 and be further imprisoned until such fine is paid or [170] until you are discharged as provided by law.

In addition to the 10-year period of imprisonment imposed under count 3 of the indictment, you shall pay a fine of \$2,000 unto the United States of America and be further imprisoned until the fine is paid or until you are discharged as provided by law.

In addition to the 10-year period of imprisonment imposed under count 4 of the indictment, you shall pay a fine of \$2,000 unto the United States of America and to be further imprisoned until the said fine is paid or until you are discharged as provided by law.

In addition to the 10-year period of imprisonment provided in count 5 heretofore imposed, you shall pay a fine of \$2,000 unto the United States of America and be further imprisoned until the said fine is paid or until you are otherwise discharged as provided by law.

As I stated before, the 10-year period of imprisonment under count 1 and the 10-year period of imprisonment under count 2 are to be served consecutively, so that in all you will serve a 20-year period of imprisonment. The 10-year periods of imprisonment imposed under counts 3,

4, and 5 shall commence and run concurrently with the period of imprisonment imposed under count 2.

The payment of one fine of \$10,000 shall satisfy all fines imposed under all six counts of the indictment.

You are now remanded to the custody of the marshal. [171]

Los Angeles, California, Tuesday, February 18, 1947,
2:00 P.M.

(Case called by the clerk.)

The Court: May I have the name of counsel appearing?

Mr. Ragland: Ragland, E. S., appearing for Walter Gordon.

The Court: Associate attorney at the present time for the attorney representing Herman Hayman, Mr. Ragland?

Mr. Ragland: I am associated with Mr. Gordon at the present time.

The Court: How shall we enter that appearance, now, Walter L. Gordon, Jr., and—

Mr. Ragland: E. S. Ragland.

The Court: —E. S. Ragland.

Has the defendant made a designation, Mr. Clerk?

The Clerk: No; he has not, your Honor.

The Court: You will include both Mr. Gordon's name and your name, Mr. Ragland.

Mr. Ragland: All right, your Honor.

The Court: That is satisfactory to you, Mr. Hayman?

The Defendant: Yes; it is, your Honor.

The Court: Then you will sign the designation.

Herman Hayman, at the time the court sentenced you on January 20th last for the offenses charged in counts 2, 3, 4, and 5 of the indictment, the court imposed upon you a [173] fine of \$2,000, as well as a term of imprisonment under each of those counts. Section 73 of Title 18 of the United States Code provides that, for the offenses charged in those counts 2, 3, 4, and 5 of the indictment, the maximum sentence should be a fine of not more than \$1,000 and imprisonment of not more than 10 years.

The court has ordered you brought back at this time for the purpose of correcting that sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

The court directs that there be entered this day a corrected judgment as follows:

It is ordered and adjudged that the defendant, having been found guilty of the offenses charged in the six counts of the indictment, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of 10 years in an institution to be selected by the Attorney General of the United States or his authorized representative and pay unto the United States a fine of \$2,000 for the offense charged in count 1 of the indictment; and be further imprisoned for a period of 10 years and to pay unto the United States a fine of \$1,000 for the offense charged in count 2 of the indictment; and be further imprisoned for a period of 10 years and pay unto the United States a fine of \$1,000 for the offense charged in count 3 of the indictment; and be

further imprisoned for [174] a period of 10 years and pay unto the United States a fine of \$1,000 for the offense charged in count 4 of the indictment; and be further imprisoned for a period of 10 years and pay unto the United States a fine of \$1,000 for the offense charged in count 5 of the indictment.

It is further ordered and adjudged that the 10-year periods of imprisonment imposed under count 1 and count 2 of the indictment shall run consecutively and that the 10-year periods of imprisonment imposed under counts 3, 4, and 5 of the indictment shall all commence and run concurrently with the 10-year period of imprisonment imposed under count 2 of the indictment; so that the total period of imprisonment will be 20 years.

It is further ordered that the defendant pay unto the United States a fine of \$10,000 for the offense charged in count 6 of the indictment, and that payment of the total fine of \$10,000 shall fully satisfy all fines imposed under counts 1 to 6, inclusive, of the indictment.

It is further ordered that the defendant be further imprisoned until the fine of \$10,000 is paid or he is otherwise discharged as provided by law.

It is further ordered that this corrected sentence shall supersede the sentence imposed January 20, 1947; that this judgment shall be entered nunc pro tunc as of January 20, 1947, and that all sentences herein imposed shall commence [175] and run from January 20, 1947.

[Endorsed]: Filed Feb. 20, 1947. [176]

[Endorsed]: No. 11530. United States Circuit Court of Appeals for the Ninth Circuit. Herman Hayman, Appellant, vs. United States of America, Appellee. Transcrip of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 7, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 11530

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

APPELLANT'S OPENING BRIEF.

WALTER L. GORDON, JR.,
4104 South Central Avenue, Los Angeles 11,
Attorney for Appellant.

JUL - 8 1947

PAUL P. O'BRIEN,
CLERK





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No. 11530

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable Ninth Circuit Court of Appeals of the
United States of America:*

This is an appeal from the District Court of the United States, Southern District of California, Central Division, of a conviction of the Appellant in six counts of an Information charging the defendant in count one with violation of U. S. C., Title 18, Sec. 78, to-wit, falsely personating a true and lawful holder of a debt of, and due from, the United States; in Count Two with violation of U. S. C., Title 18, Sec. 63, to-wit, falsely making, forging, and counterfeiting, and causing and procuring to be falsely made, forged and counterfeited a certain endorsement on a check; in Count Three with violation of U. S. C., Title 18, Sec. 73, to-wit, uttering and publishinig as true, and causing to be uttered and published as true, a false, forged and counterfeit signa-

ture on a check; in Count Four with violation of U. S. C., Title 18, Sec. 73, to-wit, forgery; in Count Five with violation of U. S. C., Title 18, Sec. 73, to-wit, uttering and publishing as true, and causing to be uttered and published as true, a false, forged and counterfeit signature on a check and in Count Six with violation of U. S. C., Title 18, Sec. 88, to-wit, conspiracy.

Jurisdiction.

The Jurisdiction of this Court is conferred by U. S. C., Title 18, Secs. 73, 78, and 88.

On November 20, 1946, the Grand Jury returned an indictment against defendant in six counts.

Count One of the indictment charges a personation by falsely personating to be the true and lawful holder of a Government obligation: to-wit, a Treasury check in the sum of \$100.00. Count Two of the indictment charges the forging or the causing to be forged of a material fact, the signature. Count Three of the indictment charges the utterance of the same check. The first three counts refer to a single check. Count Four of the indictment charges forgery of a second check.

Count Five of the indictment charges uttering the second check and Count Six charges conspiracy in forging and uttering the second check.

The Defendant plead not guilty and waived a trial by jury. The Defendant was found guilty on all counts and judgment was pronounced against Defendant on January 20, 1947, by the Honorable Judge William C. Mathis. Notice of Appeal was duly and regularly filed on January 27, 1947.

Statement of Facts.

This case was tried to the Court on the pleadings and on oral and documentary evidence submitted by the parties. The basic facts may be summarized as follows:

JUANITA JACKSON had known the Defendant about seven years. The Defendant owned an automobile and the witness would ride around with him and steal checks from mail boxes [R. 39]. The Defendant did not put the payee's name on the back of the check, but at times the Jackson girl did [R. 40]. She would take the check to wherever the Defendant saw fit and then she would sign the check and cash it. They had identification cards and the witness would fill her name in for the purpose of getting the checks cashed. None of the checks ever came to her endorsed [R. 42]. They would cash the checks usually at liquor stores. Sometimes the witness Jackson would use operator's license for identification in getting the checks cashed. The witness Jackson would cash the checks [R. 55].

DOROTHY McCLAIN drove around with Appellant taking checks out of mail boxes [R. 70]. The witness McClain would put the payee's name on the checks then cash them [R. 71]. The witness McClain would place her hand writing on the identification cards to get the checks cashed [R. 22-72]. The witness McClain placed the endorsement on the check of Lieutenant Charles A. Wilburn [R. 73; Government's Exhibit 2, R. 23].

PAUL CHESTER REDD endorsed the check contained in Counts One, Two and Three of the indictment made out to Samuel T. Thompson [R. 95; Government's Exhibit 4, R. 24]. Redd also endorsed other checks [R. 96]. The checks were handed to Redd, together with a slip of paper and he would endorse the checks according to the slip of paper. He did not know who had written the name on the slip of paper [R. 101].

JOHN H. MARTIN conducted a liquor store at Sixty-second and San Pedro Streets. The Defendant came into his store and cashed the Samuel T. Thompson check and stated he was Samuel T. Thompson and that the check was his [R. 111]. The check was not endorsed in his presence [R. 112].

SAMUEL T. THOMPSON had never given anyone permission to cash his checks [R. 34]. Nor did he receive any of the proceeds.

CHARLES A. WILBURN had never given anyone permission to cash his check and had neither received any of the proceeds [R. 36].

Despite the evidence offered by the prosecution the Defendant denied that he took any checks from mail boxes or that he drove anyone around to steal checks [R. 126].

Statement of Points to Be Urged.

1. The evidence in its entirety is insufficient to support the judgment of conviction.
2. The evidence is insufficient to show that the offenses were committed within six years before the filing of the indictment.
3. The evidence is insufficient to show that Appellant personated a lawful holder of a debt of the United States.
4. The evidence is insufficient to show that a conspiracy was entered into.

Summary of Argument.

Herman Hayman was convicted upon the testimony of Juanita Jackson, Dorothy McClain and Paul Redd that he forged or caused to be forged the checks set forth in the indictment. These witnesses were clearly accomplices and their testimony lacked the necessary corroboration necessary to sustain a conviction.

In Counts Two and Four, Appellant was charged with forgery, although Dorothy McClain and Paul Redd admitted they were the ones who endorsed the checks.

Although certain dates are laid in the indictment as to the occurrence of the acts the record is absolutely devoid of any evidence tending to show that the alleged crimes took place within the period of the statute of limitations.

ARGUMENT.

I.

Insufficiency of the Evidence to Sustain the Judgment of Conviction.

We emphatically assert that the evidence herein in its entirety is legally insufficient to support the judgment of conviction and should therefore be reversed.

We shall attempt to analyze the evidence on each Count in the manner in which they appear in the indictment.

COUNT I charges the Defendant with personating one Samuel T. Thompson, a true and lawful holder of a debt, due from the United States.

The evidence shows that Defendant entered a liquor store at Sixty-second and San Pedro Streets in Los Angeles and purchased some liquor. He passed a check made payable to Samuel T. Thompson and told the liquor dealer that he was Samuel T. Thompson and the check was his musteringout pay. The check was cashed [R. 110-111].

It will be noted as to this Count no date or time is shown as to when Appellant entered this store and cashed the check.

Offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and indictable under any existing statutes, the period of limitation shall be six years.

In *People v. James*, 59 Cal. App. (2d) 425, the court said:

“The principal point made on appeal is that the evidence is insufficient to show that the offense was committed within three years before the filing of the information, this being the statutory period of limitation for prosecutions of this offense. (Penal Code, Sec. 800.) This contention must be sustained. The information was filed December 26, 1941, and alleged that the offense charged was committed on December 13, 1941. The Defendant’s plea of not guilty put in issue this allegation of the information (citing cases), and while the People were not required to prove the date exactly as alleged, the burden was on them of showing that the offense occurred within the period of limitation. (Citing cases.)”

The Court further held that dates shown on the exhibits could not be used to establish the date and time of the offense.

In *Charters v. United States*, 289 Fed. 63, in a prosecution for violating the banking laws, evidence that the items alleged to have been embezzled by Defendant were accomplished by endorsements on a depositor’s time certificate, all the transactions being more than three years prior to the date of the return of the indictment, it was held to show conclusively that the prosecution was barred by limitations.

In the instant case there is no evidence tending to prove that the defendant committed the crime charged in Count One within six years prior to the filing of the indictment.

COUNT II charges the Defendant with forging the Samuel T. Thompson check [Government's Exhibit 4, R. 25]. Paul Redd testified that he forged the name of Samuel T. Thompson on the check [R. 95].

This testimony clearly established Redd as an accomplice.

A conviction cannot be had upon the testimony of an accomplice unless it be corroborated.

People v. Jones, 87 Cal. App. 482.

An accomplice is an associate in the commission of a crime, and is one who unites in the commission of the crime, and he must be one who is liable to prosecution for the identical offense charged against the defendant.

People v. Frahm, 107 Cal. App. 253.

Clearly the testimony of Redd was that of an accomplice. In determining the question of corroboration the testimony of the accomplice must be eliminated from the case.

People v. Hobson, 7 Cal. App. (2d) 392.

There is not one iota of evidence in the record to support the contention of the prosecution that the Defendant procured the witness Redd to sign the signature of Samuel T. Thompson to the check mentioned in Count Two.

Also it might be pointed out that no date is shown when Defendant asked the witness Redd to sign the check, to bring the crime within the statute of limitations as heretofore argued.

COUNT III charges the Defendant with uttering and publishing the Samuel T. Thompson check.

This conviction is based upon the testimony of Jackson H. Martin [R. 110-111].

The indictment charges that on or about March 26, 1946, Defendant uttered and published the check. Since no date is mentioned as to when the alleged crime was committed, the evidence fails to establish that it was committed within the statute of limitations and the argument urged in support of the insufficiency of the evidence under Count I is incorporated herein.

COUNT IV of the indictment charges defendant with the forgery of the Wilburn check [Government's Exhibit 2, R. 23].

Dorothy McClain admitted that she signed this check [R. 73]. This testimony clearly established her as an accomplice and her testimony standing alone is insufficient to sustain the conviction. We submit that there is no corroboration. S. Kendall Gibson testified that Dorothy McClain cashed the check and endorsed her signature thereon [R. 118]. Based on the foregoing evidence we cannot conceive how or in what manner it establishes that Defendant is guilty of the crime charged.

The evidence merely showed that Defendant accompanied Dorothy McClain to the store and tried on a pair of shoes.

The corroborating evidence required to convict a Defendant, in addition to that of an accomplice, is not sufficient if it merely tends to raise a suspicion of the guilt of the accused.

Corroboration of an accomplice's testimony is not sufficient if it merely shows commission of the offense or circumstances thereof.

People v. Baker, 25 Cal. App. (2d) 1.

Again we might point out that no date is shown when this alleged occurrence took place. The witness S. Kendall Gibson merely testified that in March, 1946, he was employed at the Goodwin Shoe Store in Hollywood. There is no evidence to show that the forgery took place on that date or some other time. There is no evidence as to when the witness Dorothy McClain and Defendant were in the store. No witness was produced to show what relation, if any, the date that the witness Gibson was employed in the shoe store bore to the time that the check was endorsed. The record is devoid of any evidence as to the date the Defendant and Dorothy McClain entered the store [R. 116].

COUNT V related to the uttering and passing of the Wilburn check and the same argument used in support of Count IV may here be used.

COUNT VI of the indictment charges conspiracy to forge and publish and utter checks.

The indictment charges that the overt acts were committed on or about March 26, 1946. Again we submit that there is no evidence to establish the date of the alleged overt act and the evidence is insufficient to prove that the offense was committed within the statute of limitation.

The evidence merely shows that S. Kendall Gibson, by whom the prosecution sought to establish the overt acts, was employed at Goodwin Shoe Store in March, 1946.

The date that the Defendant and the McClain girl entered the store is not shown [R. 116].

U. S. C., Title 18, Sec. 582 is applicable to offenses described in *U. S. C., Title 18, Sec. 88.*

Green v. United States, 154 Fed. 401;

Brown v. Elliott, 225 U. S. 392.

To warrant conviction of conspiracy under this section, the overt act charged in the indictment must be proved.

Fredericks v. United States, 292 Fed. 856.

Proof of the overt act, in addition to fact of conspiracy is essential to a valid conviction.

Weinstein v. United States, 11 F. (2d) 505.

The overt acts must be proved as laid.

United States v. Ault, 263 Fed. 800.

Proof of the formation by Defendant and others more than three years before the indictment of such a conspiracy as that charged in the indictment and of an overt act thereunder prior to the three years is insufficient to sustain the charge of conspiracy within the three years.

Ware v. United States, 154 Fed. 577.

The burden of proof is on the prosecution to show that the offense occurred within the period of limitation.

People v. James, 59 Cal. App. (2d) 121.

Conclusion.

For the foregoing reasons we respectfully submit that the judgments herein should be reversed.

Respectfully submitted,

WALTER L. GORDON, JR.,

Attorney for Appellant.



No. 11530.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,
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No. 11530.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Sections 78, 73, and 88, of Title 18 of the United States Code. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C. 41 (2)). The offenses charged were committed in the City of Los Angeles, State of California [R. 113, 94, 100, 73, 79, 85].¹ Judgment was entered on January 20, 1947 [R. 14-16] and a corrected judgment was entered *nunc pro tunc* on February 18, 1947 [R. 17-20]. Notice of appeal was filed on January 27, 1947 [R. 20]. This court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

¹The references preceded by "R." are to the printed Record on Appeal; those by "A. B." are to Appellant's Opening Brief.

Statutes Involved.

Count One of the indictment is under Section 78 of Title 18 of United States Code, which provides, in part:

“Whoever shall falsely personate . . . any person entitled to any annuity, dividend, pension, prize money, wages, or other debt due from United States, and, under color of such false personation, . . . shall receive or endeavor to receive . . . the money of any person really entitled to receive such annuity, dividend, pension, prize money, wages, or other debt, shall be fined not more than \$5,000 and imprisoned not more than ten years.”

Counts Two through Five, both inclusive, are under Section 73 of Title 18 of the United States Code, which provides in part:

“Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; * * * shall be fined not more than \$1,000 and imprisoned not more than ten years.”

Count Six is brought under Section 88 of Title 18 which provides:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.”

Statement of the Case.

On November 20, 1946, the federal Grand Jury at Los Angeles returned an indictment in six counts, which was filed that day in the United States District Court for the Southern District of California, Central Division, charging appellant with personation of the holder of a Government obligation, forging and uttering Government checks, and conspiracy to commit offenses against the United States [R. 2-11].

The first three counts of the indictment involved a check for \$100 dated March 24, 1946, payable to Samuel T. Thompson, drawn on the Treasurer of the United States for mustering out pay. Count One charged appellant with impersonating Thompson and under color of such personation receiving and endeavoring to receive the money due under the check [R. 2-3]. Count Two charged appellant with causing the same check to be forged and counterfeited by causing the signature of the payee to be endorsed thereon [R. 4-5]; and Count Three charged

appellant with uttering and publishing, and causing to be uttered and published as true, the same check [R. 5-6].

Counts Four, Five and Six involved a check dated February 28, 1946, payable to 1st Lt. Charles A. Wilbun, drawn on the Treasurer of the United States in the amount of \$282.50. Count Four charged appellant with causing the check to be forged and counterfeited by causing the signature of the payee to be endorsed thereon [R. 7-8]. Count Five charged appellant with causing the forged check to be uttered and published as true [R. 8-9]; and Count Six charged a conspiracy between appellant and others to forge and counterfeit the same check and to utter it as true [R. 10-11].

Appellant pleaded not guilty to all six counts on December 2, 1946 [R. 12]. Trial by jury was waived [R. 12], and appellant was tried before the Honorable William C. Mathes, District Judge, on January 7, 1947, and was found guilty on all six counts [R. 12-13]. On January 20, 1947, appellant was sentenced [R. 14-16], and the sentence was corrected *nunc pro tunc* pursuant to Rule 35 of the Rules of Criminal Procedure on February 18, 1947 [R. 17-20], to be imprisoned for ten years and fined \$2,000.00 on Count One, to be imprisoned for ten years and fined \$1,000.00 on each of Counts Two, Three, Four, and Five, and fined \$10,000.00 on Count Six. Imprisonment sentences under Counts One and Two were to run consecutively, and those under Counts Three, Four, and Five to run concurrently with Count Two, so that the total imprisonment served would be twenty years, and a

payment of \$10,000.00 would satisfy all fines. Appellant was ordered committed until the fines were paid [R. 17-20].

Facts.

Appellant was engaged in stealing, forging, and cashing, Government checks; his general operations were described by his associates, two women, Juanita Jackson and Dorothy McClain, and one man, Paul Chester Redd, III. Appellant would drive the women around the streets of Los Angeles in his car, would park, and would tell them to go to a mail box a few houses back and take out the check that was in it [R. 85, 39, 47-53, 68, 70-71, 82-85]. Appellant explained to them that a woman was less conspicuous going to a mail box than a man [R. 53].

Either the women [R. 40, 62, 71, 70] or Redd [R. 95-96, 100-105] subsequently endorsed the checks with the name of the payee, at appellant's request. Sometimes the women also endorsed checks brought to them by the appellant which they had not stolen [R. 46, 70].

Appellant furnished the girls with identification cards to correspond with the names on the checks [R. 40-42, 57, 71-72, 89-90]. The girls then cashed the checks, usually at liquor stores, men's stores, and sometimes at check cashing agencies [R. 42, 55, 71, 77, 92-93], with appellant driving them to the place of cashing [R. 61, 90-93]. The girls turned the proceeds over to appellant [R. 40, 60, 71, 91], and he then gave them back a small part of the amount [R. 63, 71, 91]. Appellant also some-

times gave something to Redd for endorsing checks for him [R. 96, 104, 106-107]. Appellant had at least one other girl working for him in the same way [R. 88]. There were about fifty checks in all involved [R. 41; see also R. 77].

The check for \$100 payable to Samuel T. Thompson, which is involved in the first three counts of the Indictment [Gov. Ex. 4, R. 24-25], bore on its back the endorsement "Samuel T. Thompson." Samuel T. Thompson testified it was not his signature [R. 34], that he had not authorized anyone to sign the check for him [R. 34], and that he had never received the proceeds of the check [R. 35].

Appellant had brought the Thompson check to Redd and, at appellant's request, Redd had endorsed "Samuel T. Thompson" thereon [R. 94-95]. Appellant then bought two bottles of whiskey at the liquor store of Jackson H. Martin in Los Angeles, tendering the check in payment [R. 110], stating to Martin that he, appellant, was Samuel T. Thompson [R. 111], and that the endorsement was his signature [R. 112]. Martin cashed the check, giving appellant the balance remaining above the price of the liquor [R. 111].

The check for \$282.50 payable to 1st Lt. Charles A. Wilbun, which was involved in the Fourth, Fifth, and Sixth counts of the Indictment [Gov. Ex. 2, R. 23] bore the endorsements, "Charles A. Wilbun" and "Gloria W. Wilbun."

Charles A. Wilbun testified that the endorsement was not his signature, that he had not authorized anyone to endorse the check for him, and that he had never received the proceeds of the check [R. 36-37].

This check had been cashed under the following circumstances: Appellant, with Dorothy McClain and another, went to Goodwin's Shoe Store in Hollywood [R. 73, 116, 137] where they bought three pairs of shoes and a pair of slippers of a size to fit appellant [Gov. Ex. 5, R. 26, 116; see also Gov. Ex. 3, R. 124, 75]. Dorothy McClain then endorsed the Wilbun check in the store [R. 73, 79-80, 122], and gave it in payment for the shoes, receiving the excess in cash. She gave the cash to appellant, and he gave some of it back to her [R. 74, 81-82].

Summary of Argument.

Only two points are argued by appellant in his brief, and they are both without merit. The evidence introduced by the Government clearly establishes that the offenses charged were committed within the Statute of Limitations, and fixes the dates on about which the offenses were committed. The law in the Federal courts is clear that a defendant can be convicted on the uncorroborated testimony of an accomplice. Moreover, appellant in this case was convicted on far more evidence than the uncorroborated testimony of accomplices.

I.

**The Acts Charged in the Indictment Were Proven
to Have Occurred Within the Statute of Limita-
tions.**

Appellant contends that there is no evidence that the crimes charged were committed within the period of the Statute of Limitations (A. B. 6-11). We disagree. The evidence plainly supports the judgment.

The Thompson check, involved in the first three counts of the Indictment, is dated March 24, 1946. It bears on its back the stamped endorsements of two banks dated March 27, 1946, and March 28, 1946. It is cancelled by the perforations "4 4 46" [Gov. Ex. 4, R. 25]. In addition, Jackson H. Martin testified that the check was cashed by him for appellant in about the middle of March [R. 115]. Redd, who endorsed the Thompson check, stated that he met appellant for the first time in June of 1945 [R. 94, 100] and that he started endorsing checks for appellant some time in 1945 [R. 103-106].

The Wilbun check, involved in Counts Four, Five and Six of the Indictment, is dated February 28, 1946. It bears on its back the stamped endorsement of a bank dated March 6, 1946. It is cancelled by the perforations "3 13 46." [Gov. Ex. 2, R. 23]. Dorothy McClain, who admittedly cashed the check, met the defendant for the first time towards the end of 1945 or the first part of 1946 [R. 69, 78].

From these facts it is manifest that there is substantial evidence fixing the dates of these occurrences well within

the period of the Statute of Limitations, which in attempts to defraud the United States is six years (18 U. S. C. 582).

Moreover, it is settled that an offense need not be proven to have been committed on the day alleged, unless the day is made material by the statute. Proof of any day before the finding of the indictment and within the Statute of Limitations is sufficient. *Ledbetter v. U. S.*, 170 U. S. 606, 612 (1898); *Cornett v. U. S.*, 7 F. (2d) 531, 532 (C. C. A. 8, 1925); *Weeks v. Zerbst*, 85 F. (2d) 996, 997 (C. C. A. 10, 1936); *Hume v. U. S.*, 118 Fed. 689, 696 (C. C. A. 5, 1902), cert. den. 189 U. S. 510.

II.

There Can Be a Conviction on the Uncorroborated Testimony of Accomplices.

It is well-settled, of course, that in the Federal Courts, a defendant can be convicted on the uncorroborated testimony of an accomplice. See, *e. g.*, *Caminetti v. United States*, 242 U. S. 470, 495 (1917); *Westenrider v. United States*, 134 F. (2d) 772, 774 (C. C. A. 9, 1943); *United States v. Wilson*, 154 F. (2d) 802, 805 (C. C. A. 2, 1946, Judgment vacated and remanded for resentence 328 U. S. 823); *Kempe v. United States*, 151 F. (2d) 680, 686 (C. C. A. 8, 1945); *Robertson v. United States*, 111 F. (2d) 1018 (C. C. A. 6, 1940).

Appellant's reliance on State cases is clearly misplaced.

Moreover, in this case appellant was convicted on far more than the uncorroborated testimony of accomplices.

Both Samuel T. Thompson and Charles A. Wilbun, the payees of the two checks involved, testified that the checks had never been endorsed by them or with their permission, and that they had never received the proceeds of the checks [R. 34-35, 36-37]. Jackson H. Martin, the owner of the liquor store where appellant appeared with the Thompson check, masquerading as Thompson, and cashed it, identified appellant, and testified concerning the entire transaction [R. 110-115]. S. Kendall Gibson, the manager of the Goodwin Shoe Store in Hollywood, testified as to the entire transaction when Dorothy McClain and appellant bought shoes at his store and negotiated the Wilbun check in payment [R. 116-123].

The sales slip for the shoes [Gov. Ex. 5, R. 26] shows that they were sold to Charles A. Wilbun and that a check for \$282.50 was taken in payment for the shoes.

Appellant, in his testimony, admitted that he had purchased the shoes under the circumstances related, but contended that it was all Dorothy McClain's idea and that she merely gave him one of the pairs of shoes [R. 137-139].

From this it is plain that appellant was convicted on more than the mere uncorroborated testimony of an accomplice, which alone clearly would have furnished sufficient evidentiary basis for the conviction and judgment in this case.

Conclusion.

It is apparent from the record that appellant had a fair trial, and that he was convicted with the overwhelming weight of the evidence against him as to each count. The points urged by appellant on this appeal are plainly not substantial. The conviction should be affirmed.²

Respectfully submitted,

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²Of course it is elementary that where a judgment provides for concurrent sentences on two or more counts, it is sufficient if any one of the counts on which sentences run concurrently can be sustained on appeal.



No. 11,531

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WILBUR JOSEPH WILSON,

Appellant,

vs.

INTEROCEAN STEAMSHIP CORPORATION (a
corporation), and UNITED STATES OF
AMERICA,

Appellees.

Upon Appeal from the District Court of the United States for
the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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I.

Where the trial judge heard all of the witnesses save one, and his testimony sustained the court's decree, and the trial judge clearly expressed his opinion on the credibility of the witnesses, this court, in an admiralty appeal, should give great weight to the trial court's findings, and should not reverse the judgment unless the findings are clearly erroneous	6
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II.

Under admiralty law, appellant has not sustained his burden of proving negligence on the part of respondent	9
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III.

This is not a case where there was a failure to maintain any lookout, therefore appellant's cases based on such evidence are not in point. But, in any event, the preponderance of the evidence favors respondent	14
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No. 11,531

IN THE

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WILBUR JOSEPH WILSON,

Appellant,

vs.

INTEROCEAN STEAMSHIP CORPORATION (a
corporation), and UNITED STATES OF
AMERICA,

Appellees.

Upon Appeal from the District Court of the United States for
the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

In this case a libel *in personam* was filed by appellant making claims for damages and for wages, maintenance and cure against respondents under the Public Vessels Act, 46 U.S.C.A., §781; the Suits in Admiralty Act, 46 U.S.C.A. § 742; Public Law 17, 50 U.S.C.A. App. § 1291. (I R. 10.)

On his claim for damages for negligence, appellant dismissed his action as to all respondents save the United States, electing to proceed only against the United States under the Public Vessels Act, and

against the United States, acting through the War Shipping Administration, under the Suits in Admiralty Act for wages, maintenance and cure. (II R. 8.)

The case was heard before the Honorable Louis E. Goodman, Judge of the United States District Court. A decree in accordance with findings of fact and conclusions of law was entered in favor of libelant on his claim for wages and maintenance to September 21, 1945; and in favor of respondent United States on the claim for damages for negligence; libelant's claim for cure was left in abeyance pending action by the United States Marine Hospital. (I R. 42.)

This appeal is prosecuted solely from the judgment for respondent United States on appellant's action for damages based on negligence. (I R. 44.)

STATEMENT OF FACTS.

This case is based upon the alleged negligent operation of a United States Navy launch in which appellant was riding. The launch was operating on the waters of Pearl Harbor on the night of August 1, 1945, during the "brownout" then in force when it struck a line from a hospital ship attached to an unlighted mooring buoy, throwing appellant forward in the launch and causing certain physical injuries.

On the question of the alleged negligent operation of the launch, appellant and his witnesses all testified orally at the trial. Respondent introduced the written

statement of Ensign Joseph Kreplik, of the United States Navy, who was then present and in charge of the launch. (The statement is not copied in the record, but is an exhibit, see II R. 102, and is set forth in full in the appendix to this brief.)

Appellant Wilbur Joseph Wilson testified in substance that he had gone ashore in the afternoon of August 1, 1945, and had returned to the New Fleet Landing about 8:15 p.m. to find transportation back to his ship, the Notre Dame Victory. (II R. 16.) He said it was dark and the town was browned out. (II R. 16, 35.)

In regard to the channel and the way the ships were moored, appellant stated that there was a channel 500 to 600 feet wide, and that the ships were moored to the right of this channel, and parallel to the channel. (II R. 20, 42.) He testified that the channel was lighted, and also the ships and mooring buoys. (II R. 35.)

However, he later stated that he did not know if there was a light on the mooring buoy to which the line in question from the Repose was attached. (II R. 48.) He stated that the hospital ship Repose was the first vessel to the right as the launch left the dock, being some 200 or 300 yards from the dock. (II R. 18, 19.)

On the operation of the launch, appellant testified that the launch was 50 feet in length, that he was seated in the first seat forward, which was a high seat so that he was seated in a somewhat standing

position. (II R. 18.) He stated he saw the Navy coxswain, the helmsman on the launch, and that there were two or three fellows with him, and he was talking to them and not paying any attention where he was going. (II R. 19.) He stated that when the accident occurred (some two or three hundred yards after the launch left dock) the launch was going "wide open," some 17 to 18 knots. (II R. 19, 20.) He stated that the launch veered to the right as soon as it left the dock, and that there was no lookout in the bow of the launch. (II R. 20, 35.) On cross-examination appellant testified he was seated looking forward; and he changed his testimony in regard to speed stated, reducing the speed from 17 or 18 knots to 11 or 12 knots. (II R. 44, 46.)

Appellant called Walter C. Lubinski, who was also aboard the launch when the accident happened. He stated that the channel was 500 to 600 feet wide, that channel buoys were lighted, and the *Repose* was lighted (II R. 51.) He stated the ships were not moored parallel to each other, but that they were moored some further towards the channel and some further away, so as to aid in maneuvering the ships. (II R. 55.)

He said he was sitting about amidship on a side port, that he observed the coxswain and saw three or four men with him. However, he said nothing about the coxswain talking to these men or that he was failing to pay attention to where he was going. He stated there were four Navy personnel in the crew of the launch and that he did not observe a lookout

at the bow. (II R. 50.) He stated that he merely "presumed" that the launch was going wide open, but that he could not tell. He said the launch headed into the channel, then started to the right and after that he paid no more attention as he could not see over the bow of the launch. (II R. 52.) For this reason he could not see whether the mooring buoy in question was lighted or not. (II R. 54.)

John Edward Dunn, second officer on the Notre Dame Victory, testified for appellant. He stated that the Notre Dame Victory was moored some 2000 yards from the dock and that there were only three lighted channel buoys on each side of the channel for this whole distance. (II R. 73.) He stated that none of the mooring buoys were lighted in Pearl Harbor. (II R. 63.) He said the Naval launches served all the ships in the Harbor and moved in and out of the channel to pick up and discharge passengers.

Dr. Faede, a nose and throat specialist from the Marine Hospital, testified as appellant's medical expert. He stated that he examined appellant on September 13, 1945. At that time he noted the scar on his nose was healed, but somewhat tender, and the doctor made a note that appellant might require an operation in the future to correct a moderate septal deflection. (II R. 95.) On September 13, 1945, he found appellant fit for duty; that the condition of appellant's nose did not interfere with his breathing very much. (II R. 95.) He stated that appellant's condition, a deviated septum, was a common thing to find. (II R. 97.)

The statement of Ensign Joseph Kreplik (Appendix to this Brief) sets out in full his version of the accident. In summary, his statement shows appellant was transported as an accommodation to him; that a blackout was in effect; that he stationed the crew where they would be most effective as lookouts; that they were all looking for anything in the water but could not see the lines because of the blackness; that a searchlight could not be used; that they were travelling at one-third speed.

QUESTION.

Did appellant sustain his burden of proving that the naval launch struck the line due to any negligence in its operation?

ARGUMENT.

I.

WHERE THE TRIAL JUDGE HEARD ALL OF THE WITNESSES SAVE ONE, AND HIS TESTIMONY SUSTAINED THE COURT'S DECREE, AND THE TRIAL JUDGE CLEARLY EXPRESSED HIS OPINION ON THE CREDIBILITY OF THE WITNESSES, THIS COURT, IN AN ADMIRALTY APPEAL, SHOULD GIVE GREAT WEIGHT TO THE TRIAL COURT'S FINDINGS, AND SHOULD NOT REVERSE THE JUDGMENT UNLESS THE FINDINGS ARE CLEARLY ERRONEOUS.

Although the rule persists in admiralty appeals that the Appellate Court will decide the case *de novo*, still, where the trial Court heard oral testimony from the majority of the witnesses, and was therefore in a much more favorable position to test their credi-

bility, the Appellate Court will give due and serious consideration to the findings of fact of the trial Court.

In *Tawada v. U. S.*, No. 11,258, decided June 16, 1947 (9 Cir.), this Court said (p. 3, white advance opinion):

“In an appeal in admiralty, where ‘a substantial part of the evidence was heard in open court’, the ‘correct rule’ is that the findings of the trial court ‘are accompanied with a rebuttable presumption of correctness’. *Thomas v. Pacific S. S. Lines, Ltd.*, 84 F. 2d 506, 507-8, CCA 9; *The Pennsylvanian*, 149 F. 2d 478, 481, CCA 9. And, ‘where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.’ (Citing *The Ernest H. Meyer*, 84 F. 2d 496, 501, CCA 9; cert. den. 299 U. S. 600.)”

In *The Catalina*, 95 F. (2d) 283 (9 Cir.), the Court said (p. 284):

“While this admiralty appeal is a trial *de novo*, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. *Ernest H. Meyer* (9 CCA), 1936 AMC 1179, 84 F. (2d) 496, 501; *Silver Line et al. v. United States et al.* (9 CCA), decided January 31, 1938, 1938 AMC 521.”

In *The S.C.L. No. 9*, 114 F. (2d) 964, the Court stated that in an admiralty appeal the trial Court’s

findings, when supported by competent evidence, are entitled to great weight. The Court further stated (p. 966), "This rule appropriately recognizes that the trial judge has a peculiar opportunity for appraising the worth of oral testimony by observing the witness' demeanor which the cold print of a record fails to disclose." And, the Court also said, speaking of certain testimony, "being oral, its credibility was for the Court at all times, even though unrefuted."

In this case Judge Goodman stated at length his opinions on the facts and the credibility of the witnesses. (II R. 110, et seq., the substance of the Court's opinion is set forth in the Appendix to this Brief, part II.)

Thus, the Court below stated that he did not accept appellant's testimony that the coxswain and operators of the launch were inattentive, and his was the only testimony to that effect. The Court also stated that he did not accept appellant's testimony that the ships were lined up parallel so that there was a direct channel, and so that any deviation from that marked channel would be dangerous. Judge Goodman accepted the testimony of Mr. Lubinski that the vessels were not moored parallel to one another, but that their positions were staggered to secure maneuverability. (II R. 55.) The Court thus indicated he accepted the testimony of the other witnesses in regard to lighted channel buoys; to the lack of lights on the mooring buoys; to the fact that the launch did not veer sharply to the right while the coxswain was negligently inattentive.

Thus, taking into account the trial Court's opinion and findings on the facts, there is no negligent inattention or failure to keep a proper lookout shown. Appellant has shown that there was a brownout in effect; that it was dark; he has not shown that the line was visible; that the most vigilant lookout could have seen the line; that the lookouts were improperly placed and inattentive; and therefore he has, we submit, proven no negligence.

II.

UNDER ADMIRALTY LAW, APPELLANT HAS NOT SUSTAINED HIS BURDEN OF PROVING NEGLIGENCE ON THE PART OF RESPONDENT.

Appellant argues that negligence on the part of respondent was shown in the inattention of the coxswain, and the failure to have a lookout.

We have already pointed out that the trial Court refused to accept appellant's testimony on the inattention of the coxswain, and since this is appellant's only proof on the subject, we submit this asserted ground of negligence should not be accepted by this Court.

On the question of the alleged failure to maintain a lookout, we wish to point out that this cause of action for negligence is being prosecuted solely under the Public Vessels Act, 46 U.S.C.A. Sec. 781 et seq., which affords a cause of action "for damages caused by a public vessel of the United States" (§ 482), and

thus the burden is placed upon appellant to prove a tortious act on the part of respondent. *American Stevedores v. Porello*, 67 S. Ct. 847; *Canadian Aviator, Ltd., v. U. S.*, 324 U. S. 215, 65 S. Ct. 639.

Under the admiralty law the burden is on the appellant to prove that the launch did not maintain a proper lookout. A case similar to the present in regard to the lookout question is *The Josephine*, 247 Fed. 296 (2 Cir.). There the libelant, the schooner Wooley, struck the claimant, the barge Josephine. It was a dark squally night, and the Josephine was riding at anchor behind a breakwater, without lights, and loaded to a freeboard of probably not over two feet. The mate of the Wooley did not sight the Josephine until she was 25 feet away.

The Court, per L. Hand, J., stated: "The sole questions in this case are *whether the Wooley maintained no proper lookout*, and, if not, whether she has shown beyond reasonable doubt that her failure did not contribute to the collision. *On the first of these questions the claimant has the burden*, on the second the libelant." (Emphasis added.)

The Court (p. 298) continues a discussion of the evidence, stating it was difficult from the record to determine exactly what happened on board the Wooley immediately before the accident. In any event, the Court states that just before the accident the mate (who sighted the Josephine 25 feet away) and the cook were in the foreward part of the ship where their work to bring the ship about and anchor behind

the breakwater was to be done. There was nothing to intercept their attention and the Court further states:

“Nowhere in the testimony can we find that either the mate or the cook was asked whether they were looking out just before the collision. Under these circumstances it does not seem to us that the claimant has proved her case. There is nothing in the events themselves which suggests a failure to keep a lookout. The night was black and squally, and there is no reason to suppose that the barge, no more than a log lying in the water, would have been made out sooner than she was whether a lookout was kept or not.” (p. 289.)

See also *Pierce v. J. R. P. Moore*, 45 Fed. 267 (D. C., N. C.)

Appellant's only evidence regarding the absence of lookouts are the statements of appellant and his ship-mate Lubinski that no lookout was standing in the bow. Neither appellant nor Lubinski at any time testified as to the absence of lookouts along the sides of this fifty foot launch, nor to their absence in the forward part of the boat. Appellant was never questioned on absence of lookouts in these parts of the launch, or on their attention or inattention at the time of the accident. (Appellant's statement regarding the absence of a lookout in the bows appears at II R. 35.) Mr. Lubinski was asked if he knew how the accident happened and he stated (II R. 52, 53):

“Mr. Resner. Q. What course did the launch take to the point of the accident?

A. The launch headed out in the channel, then it started to go off to the right. From then on I paid no more attention because it is an impossibility for me to see over the bow, anyway. * * * (p. 53.) I paid no attention. I was sitting there talking to a Naval officer. * * *

Thus Lubinski's testimony adds nothing to the question of whether the lookouts were properly maintained.

In *The Catalina*, 95 F. (2d) 283, at p. 285, (9 Cir.), Judge Denman stated:

"With regard to the attention of the lookout to his duties, the *Ariadne* rule (*The Ariadne*, 13 Wall. 475, 20 L. Ed. 542, 543) requires the highest watchfulness, but this does not alter the burden of proof on the *Catalina* to establish that it was not exercised by the *Arbutus*' lookout. *When such proof is made*, certain adverse presumptions may arise as to its causative effect, but the proof of the inattentive watchfulness must come first."

The opinion in *The Catalina* is also pertinent here because it points out most clearly that the admiralty law does not require a lookout to be stationed in the exact bow of the boat. In that case, the vessel whose lookout was questioned was a 77-foot motorboat. The lookout was shown to have stood some 23 feet abaft of the stem, alongside the port forward end of the pilot house. The Court laid down the proper rule, following *The Ottawa*, 3 Wall. 268, 273, 18 L. Ed. 165, 167, and *St. John v. Paine*, 10 How. 557, 585, 13 L. Ed. 537, 550, that the lookout, "must be in 'the

position best adapted to descry vessels approaching at the earliest moment.' This may not be at, but away from, the extreme bow of such a vessel as the *Arbutus* * * *'' (p. 285, 95 F. (2d).) See also *The Mamei*, 152 F. (2d) 924, 929 (CCA-3); *Lone Eagle-Crosby*, 126 F. (2d) 914, 1942 AMC 611, 615 (CCA-9).

The "Navigation Rules for Harbors, Rivers & Inland Waters Generally" and the "International Rules for Navigation at Sea", if we may assume that they apply to naval vessels under these conditions, merely state that a proper lookout must be maintained. (See International Rules, Art. 29, 33 U.S.C.A., § 121; Harbor Rules, Art. 29, 33 U.S.C.A. 221.)

The statement of Ensign Kreplick, officer in charge of the launch (see appendix) shows clearly that the whole crew of the launch were keeping a lookout; that he had placed the crew, including a bowhook, in places on the launch where they would be to the best advantage in this respect, and that they were coasting at one-third speed when the accident happened.

Respondent submits that appellant has clearly failed to sustain his burden of proving that the launch maintained no proper lookout.

III.

THIS IS NOT A CASE WHERE THERE WAS A FAILURE TO MAINTAIN ANY LOOKOUT, THEREFORE APPELLANT'S CASES BASED ON SUCH EVIDENCE ARE NOT IN POINT. BUT, IN ANY EVENT, THE PREPONDERANCE OF THE EVIDENCE FAVORS RESPONDENT.

Appellant argues at length (Opening Brief, pp. 12-17), rules of law regarding the failure to maintain a lookout and the presumptions arising therefrom. As we have shown under Heading II of this brief, appellant has failed to sustain his burden of proving the failure to maintain a proper lookout. The mere statements of appellant and Lubinski that there was no lookout standing in the bow, does not prove that the launch had no lookouts whatsoever. Of course, the statements of Ensign Kreplik that the naval crew were stationed about the launch where they would be to the best advantage, and were keeping a lookout is directly contradictory to appellant's theory. The trial Court, moreover, rejected appellant's statements that the helmsman was inattentive. We have no argument with the rules of law appellant cites, but we earnestly maintain that the facts do not warrant the application of such rules.

Respondent does not, nor does it have to, argue that the wheelsman is a sufficient lookout. Appellant introduced no evidence that the helmsman was the only lookout and respondent's evidence, the statement of Ensign Kreplik, shows there were sufficient lookouts other than the helmsman.

Appellant cites cases showing the duty which a free moving vessel has towards a stationary vessel, where

the facts show that the stationary vessel was clearly visible and properly anchored. See e. g., *The Shinsei Maru* (D. C.) 266 Fed. 548; *The James McWilliams* (N. Y.) 172 Fed. 919. This duty has been held not to apply where the stationary vessel was improperly anchored, *The J. L. Miner*, 260 Fed. 901 (5 Cir.), and therefore no presumption of negligence attached to the moving vessel. We are not arguing that the *Repose* was negligent, and neither is appellant. His cause of action under the Public Vessels Act is directed solely against the launch (second cause of action of libel, I R 14-16). However, we do believe that under the circumstances of this case where it was dark and good vision was substantially impaired; where blackout regulations necessitated that lights on the mooring buoys and searchlights on the launch could not be used; where the mooring lines were not visible, that the presumption in favor of a stationary vessel should not apply here. Nor should such cases apply here as *The Pavonia*, 26 Fed. 106 (2 Cir.), cited by appellant, and which impute negligence to the lookout where it was a clear, moonlight night, the route of the other ferryboat was well known, there were no obstructions to good vision, and yet the other vessel was not seen.

This is not, moreover, an action between two vessels for damages to the vessels because of collision. The negligent acts which appellant attempted to prove, and which he alleges on this appeal are inattention on the part of the helmsman, and failure to maintain lookouts. The burden of proving such negligence is upon the appellant.

Furthermore, the evidence preponderates against a finding of negligence here. The evidence does not show the lookouts were inattentive. None of appellant's witnesses saw the line. Ensign Kreplik stated the line was not visible; blackout regulations prevented the use of a searchlight. The evidence is undisputed that the mooring buoy was not lighted. Any imputation of fault that may have arisen through striking a stationary object has certainly been eliminated by the evidence in this case. *The Josephine*, supra, 247 Fed. 296; *Pierce v. J. R. P. Moore*, supra, 45 Fed. 267.

Appellant's cases involving the striking of a known object would not, of course, be applicable here. (He cites *The Park City* (D. C.), 144 Fed. 527, *The Sara* (D. C.), 180 Fed. 620.) In this regard see *Southern Bell Tel. & Tel. v. Burke* (5 Cir.), 62 F. (2d) 1015.

Appellant argues that a presumption of fault arises upon the failure to keep a proper lookout. However, as this Court stated in *The Catalina*, supra, and the Second Circuit in *The Josephine*, supra, the opposing side has the burden of proving a lack of proper lookout before such presumption arises, and, we submit, that burden has not been met. Furthermore, even conceding for the sake of argument that such a presumption of fault arises here, that presumption has clearly been dispelled by the evidence. The trial Court rejected testimony that the helmsman was negligently inattentive to his course or duties. Appellant offered no evidence as to what the rest of the launch's crew were doing, unless it can be inferred from appellant's

testimony that the crew and officer were all standing around the helmsman talking. Such an inference was not accepted by the trial Court who had the best opportunity for testing the witness' credibility. In direct contrast to such testimony is Ensign Kreplik's statement in regard to lookouts, one-third speed, blackout conditions and the unprecedented length of the mooring line; Second Officer Dunn's testimony in regard to the few lighted channel buoys; the unlighted mooring buoys, and the necessity for the launches to ply in and out of the moored vessels; and the testimony of Mr. Lubinski that the vessels were not moored parallel, but were in staggered positions.

Furthermore, since the whole evidence is that the line was invisible, the rule of *The Blue Jacket v. Tacoma Mill Co.*, 144 U. S. 371, 12 S. Ct. 711, 718, would seem to apply:

“It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent a collision.”

See also

The Nacoochee, 137 U. S. 330, 11 S. Ct. 122, 125;

The Eagle (9 Cir.), 289 Fed. 661.

IV.

THE FACTS BRING THIS CASE WITHIN THE DOCTRINE
OF INEVITABLE ACCIDENT.

Although the trial Court, we believe, decided this case primarily on the ground that appellant had not sustained his burden of proving negligence on the part of respondent, we submit that the doctrine of inevitable accident is fully applicable to the facts of this case and exonerates respondent from liability.

In *Wright & Cobb Lighterage Co. v. New England N. Co.* (D. C., N. Y.), 189 Fed. 809, affirmed (2 Cir.) 204 Fed. 762, the Court held that a ferry operating in a dense fog so that other vessels could be seen but a very short distance was not negligent for striking a carfloat where she maintained proper lookouts, was proceeding slowly and carefully, but could not hear the tug and float until too late to avoid collision.

Judge Hough, in *The Anna C. Minch*, 271 Fed. 192 (2 Cir.), stated that "the word 'inevitable' must be considered as a relative term, and construed, not absolutely, but reasonably with regard to the circumstances of each particular case." (p. 194.) See also *Adams v. Carey* (Md.), 1937 AMC 675, 190 Atl. 815. It is true that to come within the rule of inevitable accident the vessel must show that due care and caution and proper nautical skill were used. *Wright & Cobb Lighterage Co. v. New England N. Co.*, supra; *The Anna C. Minch*, supra; and see *The Fullerton*, 211 Fed. 833 (9 Cir.) where a more stringent burden was placed upon the vessel asserting inevitable accident, since it well knew the position

of the vessel which it struck in the fog. We believe, however, that the preponderance of the evidence shows that those in charge of the launch were doing all in their power to avoid striking any vessel or obstruction. The statement of Ensign Kreplik asserts that the launch had a "bowhook"; that he and the crew were keeping a lookout ahead; that the launch was moving slowly at one-third speed; that the mooring lines were not visible; that this line was exceptionally long.

The trial judge did not accept appellant's testimony that the coxswain was negligently inattentive to his duties, or that the channel was straight and clearly marked. The evidence showed that the channel had only three lighted channel buoys on each side of the channel for a distance of over a mile; that the vessels were not moored parallel, but in staggered positions; that the mooring buoys were not lighted; that it was necessary for these launches to go in and out of the channel to get to the various vessels; and, of course, that the night was dark and a "brown out" was in effect.

We submit that the preponderance of the evidence shows the accident was inevitable after proper precautions and care by respondent and thus that respondent is not liable for negligence.

CONCLUSION.

Respondent submits that appellant has failed to sustain his burden of proving that the Navy launch failed to maintain a proper lookout, or that the helmsman was negligently inattentive to his duties, evidence which appellant clearly must prove to sustain a decree in his favor. Furthermore, the preponderance of the evidence is against a finding of negligence on the part of respondent.

The rule of inevitable accident is clearly applicable here, and this doctrine alone is sufficient to support a decree for respondent.

We respectfully submit that the decree of the trial Court, based upon a clear sufficiency of the evidence, should be affirmed.

Dated, San Francisco,
July 21, 1947.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

PART I.

STATEMENT OF JOSEPH KREPLICK, 17 HANOVER CIRCLE,
LYNN, MASS. (INTRODUCED IN EVIDENCE, II R. 102.)

On the night of 1 August 1945 I was first division officer on the U.S.S. Chiwawa which was anchored in Pearl Harbor. I went ashore to do an errand in one of the ship's launches and by the time we were ready to return to the ship, the sun had already set. When I returned to the launch to go back to my ship there were three merchant seamen from the Notre Dame Victory on the dock next to the boat and they had asked the coxswain if it was all right for them to go back in our boat. I was acting boat officer at the time, since no other officers were present in the boat. Their ship was approximately three hundred yards to the port side of our ship and nearer the beach. The coxswain asked me if it would be all right to take the merchantmen back to their ship. Since the merchant ships had no boat schedule, it was customary for the Navy boats to take the merchant seamen back to their ships if it was convenient. I therefore said it would be permissible. The three merchantmen got into the boat, so we cast off. I was not under orders to take these men, but as stated above, it was customary and the coxswain asked me, so I said OK.

To answer the questions specifically:

Paragraph 1. Joseph Kreplick (Ensign, U.S.N.R.) 386501; 10 December 1944 to 15 January 1946; first division officer.

Paragraph 2. It was after sunset and extremely dark. There are mountains all about the bay that cut out the light so it gets dark pretty fast. It was practically pitch black. No lights were showing. Black-out regulations were in force and we could not use a searchlight to see where we were going. We were moving along at less than one-third speed, just barely moving along, groping our way. We were going at the same speed, just coasting along, when the accident happened, which, I would say, was about 1930. The whole crew was looking for anything in the water, but did not see the mooring line because of the blackness, in fact, could not see any mooring lines.

Paragraph 3. The three merchantmen were sitting in the forward part of the launch facing aft when the accident occurred, to the best of my knowledge. Because of the danger of navigation in the blackout, I was watching the water ahead. The stern line of the *Repose* that we hit was secured to a buoy and the buoy, I should say, was about 40 yards from the *Repose*, an unusually long distance. We could see the *Repose* but did not expect its mooring lines to extend out so far. The line sagged so that it just skimmed the water where we hit. Neither the bowhook, the coxswain nor I saw the line until we hit it. When we hit the line, there was no sudden jolt since the line had some slack in it and it was not until a few seconds later the slack was gone and the boat stopped dead in the water, at which time Wilson must have fallen forward. The initial shock was taken up in

the slack, so that the final jolt was very slight. The only effect of the jolt was what happened to Wilson, nothing happened to the boat or to any of the other personnel on board. I immediately asked, "Is everyone all right?" I noticed a fellow on the deck and I jumped down. By the time I got there he had risen and felt of his nose and noticed blood on his hands. I ordered the coxswain to make a landing to the Repose gangway. Wilson boarded the Repose under his own power and walked up the gangway. I asked the officer on the deck on the hospital ship if the duty doctor would take care of a man who hurt himself and he immediately called for the duty doctor over the PA system. By this time Wilson had already reached the quarter deck. We stayed along side about five minutes, at which time I asked the officer of the deck how Wilson was and if we should remain to take him back to his ship. The officer of the deck said Wilson was all right and would be taken back to his ship. Wilson was conscious at all times so far as I know. As a matter of fact the gangway to the Repose, which was riding very high in the water, was steep and although I had one of the other merchant seamen go up with Wilson, he did not require any assistance. The only wound I saw on Wilson was toward the end of his nose. It looked as if the cut was deep enough to require stitching to put the nose back in shape.

Paragraph 4. The only one whose name I remember is the coxswain. I do not remember who the other boat crew members were. The coxswain may

know who the bowhook was as he was from his division. The coxswain asked me if he should report the accident to the officer of the deck and I decided since the officer of the deck of the hospital ship said they would take care of everything and since he was not personnel from my ship, I did not feel it necessary to report it, and no report was made.

Paragraph 5. There were no particular ship's regulations, outside of the customary boat safety rules. When I got on the boat at the fleet landing I placed the crew members where they would be to the best advantage. I told the merchant seamen to sit down where they were in the front of the boat, which they did, and once we got underway I told the coxswain we would go back all the way very slow. When we got under way, I concentrated on the navigation of the boat and did not look at the merchant men again after I noticed they were sitting in the front of the boat facing aft, until the accident happened. Since I was the officer present, I saw that everyone was sitting as safely as possible, but I could not state whether at the time of the accident Wilson adhered to my orders. To the best of my knowledge, Wilson did not violate any of my orders.

Paragraph 6. No orders were issued to me by the Shore Patrol or by the officer of the deck or any source relative to transporting merchant seamen to and from their ship. No specific orders were ever promulgated. It was an unofficial policy of the ship to pick up merchant men and bring them back to their ships when it did not inconvenience us. The

merchant men requested the coxswain for permission, who in turn asked me. We did not volunteer.

As I was not watching the merchant men, I cannot say whether or not Wilson wantonly exposed himself to danger.

29 July 1946.

Then personally appeared Joseph Kreplik and made oath that the foregoing is true to the best of his knowledge and belief.

Before me,

Notary Public.

PART II.

OPINION OF THE TRIAL COURT. (II R. 110 ET SEQ.)

The Court. As it now stands, his nose bothers him and I think this man should have every opportunity to have it cured. That is why I will make the decree without any prejudice in that respect. The question of negligence, though, Mr. Resner, presents a different question. The ordinary seaman in the maritime service, of course, has known to him certain recognized obligations today which all judges recognize, and about which there can't be very much question. However, this accident occurred while we were still at war, although the war shortly came to an end, and during a condition while Honolulu was not completely blacked out, but still had what they called a brownout. The evidence was to that effect. The boat, which was a Government launch, was taking these men back to their merchant ship. It was the only way they could get back to the ship. It was during that, in the course of performing other duties, in that connection, and having naval vessels stationed there. While ordinarily the courts do not require an over-abundance of evidence to maintain the burden of proof that rests on the libelant, there must be some evidence as reasonably persuasive to justify the award, and every doubt should be resolved in favor of the seaman under those conditions. But here, I don't find in the evidence sufficient to fasten liability upon the United States. If I were to believe that there was a deliberate inattention on the part of those who were operating the launch, that might be sufficient, but I am not per-

suaded by that testimony of the libelant, and without that testimony there isn't enough in the record to justify a finding of negligence on the part of the United States in this instance. I don't think, without testimony, that the operators of the boat would deliberately turn their heads away from their course and would deliberately be inattentive to their work, as I say, without that testimony I don't think the evidence would be sufficient to hold the Government responsible for negligence here, and, frankly, I don't feel I should accept that testimony. That testimony has a familiar *y* earmark to it. I am not going to accept it, at least sufficient as the basis for an award. As I say, Mr. Resner, I don't think there is enough in the record of any substantial material to justify a finding of negligence.

* * * * *

The Court. He has a right to expect that the boat will be operated reasonably prudently under all of the circumstances, so as to avoid danger and injury to those on board the boat.

Mr. Resner. What possible explanation can be given for running into a line, your Honor?

The Court. The fact that these were wartime conditions; that the launch was performing duties, taking men to war vessels, as well as to the merchant ships, and that they unfortunately ran into this line that may not have been observable at all under the conditions in following the course to bring the men to their various ships.

Mr. Resner. There was a clearly defined channel. War conditions don't justify the failure.

The Court. The evidence was not clear and convincing that there was a channel. One of the other witnesses, and I forget which one it was, because it has been several weeks since the first hearing on this case, explained that more fully. The boats were not lined up, according to his testimony, so that there was a direct channel out, but, rather they were set back. A boat would go out and swing in to go to a vessel. On the strength of the original statement of the channel, I am not going to make a finding that there was a channel there that was definitely marked out, delineating a channel, so that any departure from it would be an action that would subject those in the boat to danger, because I don't think the evidence warrants that sort of thing. I think it was the second mate who described more clearly the way these boats were moored there, and if you had a case where you had a line marked out and that was the channel, and any deviation from it might be dangerous, the fact that the boat put off to the right would be very strong evidence in your favor. I don't think the evidence sustains that. If you are in any doubt about that, or about the evidence in the case, you will have the testimony written up.

* * * * *

The Court. I think that you are confused about one thing, Mr. Resner, in your enthusiasm for the cause of this libelant, and he did have a rather severe injury, but you forget that the judge has to decide the case on the facts before him. Just because you put the libelant on the stand and he says the operators

of the boat weren't paying any attention, I don't have to accept that testimony, and just because one witness takes the stand and he says there was a clearly marked-out channel, I don't have to accept that testimony.

Mr. Resner. But there is nothing in rebuttal.

The Court. I have just explained to you there was another witness who takes an entirely different situation with reference to this channel. I am not laying down academic decisions. I am going to decide the cases before me on the facts. I don't think the evidence is sufficient in this particular case.

5. In the following cases, the same result is obtained by the use of the same method, but the work is more complicated. The first case is the case of a function of two variables, and the second case is the case of a function of three variables. In both cases, the method is the same, but the work is more complicated.

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FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 24 1947

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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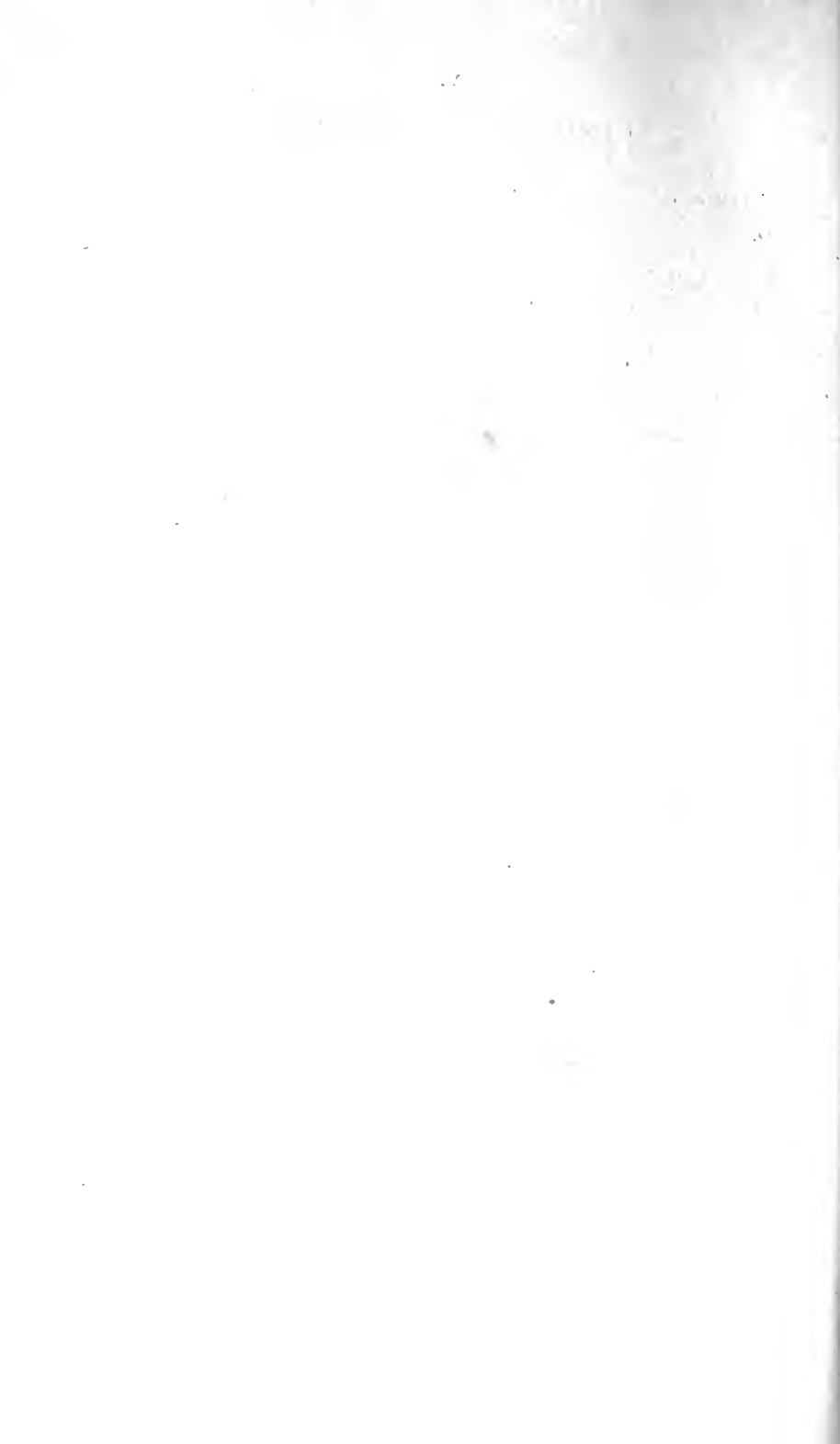
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NAMES AND ADDRESSES OF ATTORNEYS:

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For Appellee:

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United States Attorney

ERNEST A. TOLIN

Assistant U. S. Attorney

NORMAN NEUKOM

Assistant U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California, Central Division
September, 1946, Term

No. 19055

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE S. GAGE,

Defendant.

INDICTMENT

[U. S. C., Title 18, Sec. 207—Person acting on behalf
of United States soliciting and accepting bribe]

The grand jury charges:

COUNT ONE

[U. S. C., Title 18, Sec. 207]

On or about October 3, 1946, at West Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Theodore S. Gage, being a person acting for and on behalf of the United States in the official capacity of orthopedic physician in the Out-Patient department of the United States Veterans' Administration Center, West Los Angeles, California, under and by virtue of the authority of the United States Veterans' Administration, did ask for a bribe in the sum of \$100.00 from Hubert Tomsone, with intent to have his, the defendant's, decision and

action on matters which may by law be brought before him in his official capacity, namely, matters of prescribing and ordering orthopedic shoes and corrective footwear for the use of patients at said United States Veterans' Administration Center, influenced thereby. [2]

COUNT TWO

[U. S. C., Title 18, Sec. 207]

On or about October 18, 1946, at West Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Theodore S. Gage, being a person acting for and on behalf of the United States in the official capacity of orthopedic physician in the Out-Patient department of the United States Veterans' Administration Center, West Los Angeles, California, under and by virtue of the authority of the United States Veterans' Administration, did accept and receive a bribe in the sum of \$100.00 from Hubert Tomsone, with intent to have his, the defendant's, decision and action on matters which may by law be brought before him in his official capacity, namely, matters of prescribing and ordering orthopedic shoes and corrective footwear for the use of patients at said United States Veterans' Administration Center, influenced thereby.

A True Bill.

R. W. BLANCHARD

Foreman

JAMES M. CARTER

United States Attorney

[Endorsed]: Filed Nov. 27, 1946. [3]

[Minutes: Monday, December 2, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming for for arraignment and plea of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present:

The defendant states his true name is as set forth in the Indictment, and being informed that he is entitled to a jury trial and to be represented by counsel; and his attorney having waived reading of the Indictment, the defendant pleads not guilty to each of the two counts.

It is ordered that the cause is hereby set for trial on Dec. 10, 1946, at 10 A. M. [4]

[Minutes: Tuesday, December 10, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for trial of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present in custody; at 10 A. M. it is ordered that the cause is hereby continued to 2 P. M.

At 3:20 P. M. court reconvenes herein and all being present as before, it is ordered that a jury be impaneled for the trial of this cause, whereupon the clerk draws the names of the following twelve jurors, who take their

places in the jury box: Wm. H. Shonk, John V. Baldwin, Carroll Ridgway, Geo. D. Uhl, Helen Mellinkoff, J. C. Lov, Albert H. Loeffler, James Joseph Doyle, Patrick J. Conroy, Paul G. Schmitz, Chas. R. Hine, and Harry D. Dudding.

The said jurors now in the box are examined for cause and passed.

Albert H. Loeffler is excused on plaintiff's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Walter Frederick Amling who is examined for cause and passed.

John V. Baldwin is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of C. Eugene Houston, who is examined for cause and passed.

Helen Mellinkoff is excused on plaintiff's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Agnes J. Breen, who is examined for cause and [5] excused for cause by the Court. It is ordered that another name be drawn, whereupon the clerk draws the name of Margarita Brun, who is examined for cause and passed.

J. C. Love is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Lillian M. Norris, who is examined for cause and passed.

C. Eugene Houston is excused on plaintiff's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Alfred F. Chase, who is examined for cause and passed.

Wm. H. Shonk is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Andrew Morrison, who is examined for cause and passed.

And there being no further challenges the jurors now in the box are accepted and sworn as the jury for the trial of this cause, viz.:

THE JURY

- | | |
|-----------------------|----------------------|
| 1. Andrew Morrison | 5. Margarita Brun |
| 2. Alfred F. Chase | 6. Lillian M. Norris |
| 3. Carroll Ridgway | 7. Walter F. Amling |
| 4. George D. Uhl | 8. Jas. Jos. Doyle |
| 9. Patrick J. Conroy | |
| 10. Paul G. Schmitz | |
| 11. Chas. R. Hine | |
| 12. Harry D. Dudding. | |

It is ordered that the jurors present, who were not impaneled for the trial of this cause, are excused until further notice.

Attorney Neukom makes opening statement to the jury in behalf of the Government. Attorney Sullivan declines to make an opening statement, reserving said right until close of the Government's case.

Alvin O. Mark (832 S. Taylor, Montebello, Calif.) is called, sworn, and testifies for the Government and U. S. Exhibit 1 is offered and admitted in evidence.

Gordon L. Howe (290 Veterans' Hospital, Sawtelle, Calif.) is called, sworn, and testifies for the Government, and U. S. Exhs. Nos. 2 & 3 are offered and admitted in evidence.

At 4:35 P. M. the Court admonishes the jury that during the progress of this trial and the recesses therein they are not to speak to anyone or permit anyone to speak to them about this cause or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and [6] declares a recess in the trial of this cause until 10 A. M. December 11, 1946. [7]

[Minutes: Wednesday, December 11, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further trial of the defendant Theodore S. Gage; Norman W. Neukom, Esq., Asst. U. S. Attorney, appearing for the Government; Ward Sullivan, Esq., appearing for the defendant; the defendant being present and the jury being present; it is ordered that trial proceed.

Witness Howe resumes the stand and testifies further.

Frank L. Long (Chief Medical Examiner, Veterans' Administration, Sawtelle) is called, sworn, and testifies for the Government. U. S. Exhibits 4 and 5 are offered and admitted into evidence.

At 11:15 A. M. the Court admonishes the jury and declares a recess. Court reconvenes at 11:25 A. M.; all present as before; the defendant and jury are present.

Witness Long resumes the stand and testifies further.

Hubert Tomsone (426 So. Hillview, Los Angeles) is called, sworn, and testifies for the Government. U. S. Exhibit 6 is offered and admitted into evidence.

At 12 o'clock noon Court recesses until 2 P. M. Court reconvenes at 2 P. M.; all present as before, the defendant and jury are present.

Witness Tomsone resumes the stand and testifies further. U. S. Exhibit 7 is offered and admitted into evidence.

At 3 P. M. Court recesses and reconvenes at 3:25 P. M.; all present as before, the defendant and jury are present. [8]

Witness Tomsone resumes the stand and testifies further.

Charles M. Duncan (36 Veterans' Administration Center, Sawtelle, California) and Howard H. Davis (Special Agent, F.B.I., 900 Security Bldg., Los Angeles) are respectively called, sworn, and testify for the Government.

U. S. Exhibit 8 is offered and admitted into evidence.

Paul Mallory (259—25th St., Los Angeles) is called, sworn, and testifies for the Government. U. S. Exhibit 9 is offered and admitted into evidence. The Government rests.

Attorney Sullivan waives opening statement in behalf of the defendant. Herbert Alton Amrein (866 Westmount Drive, Los Angeles) is called, sworn, and testifies for the defendant.

Melvin Kramer (1434 Kelton, Los Angeles) and Nell Lifland (6454 San Vicente Boulevard, Los Angeles) are respectively called, sworn, and testify for the defendant.

Dr. Theodore S. Gage (2509 Santa Monica Boulevard, Santa Monica) is called, sworn, and testifies in his own behalf.

At 4:25 P. M. the Court reminds the jury of the admonition heretofore given and recesses herein to 10 A. M., December 12, 1946. [9]

[Minutes: Thursday, December 12, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further jury trial of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present on bond; and counsel stipulating that all are present as before, it is ordered that the trial proceed.

Defendant Gage resumes the stand and testifies further on direct examination and Defendant's Exhibit A is offered and marked for identification.

At noon court recesses until 2 P. M. At 2:15 P. M. court reconvenes and all being present as before, Defendant Gage resumes the stand and testifies further on cross-examination.

Chas. Emerson Strachan (2864 The Malle, Los Angeles) is called, sworn, and testifies for the defendant.

David I. Levine (6417 Lexington, Los Angeles) is called, sworn, and testifies for the defendant.

At 3 P. M. court recesses. At 3:30 P. M. court reconvenes and all being present as before, witness Levine resumes the stand and testifies further on direct examination.

Theodore J. Kane (632 N. Kings Road, Los Angeles) is called, sworn, and testifies for the Government.

Robert Mazet (703—24th St., Santa Monica) is called, sworn, and testifies for the defendant.

Fred Skill (119 West Broadway, Long Beach, Calif.) is called, sworn, and testifies for the defendant. [10]

Allen E. Curry (670 Shatto Pl., Los Angeles) is called, sworn, and testifies for the defendant.

Carl Kancheff (320 S. Fremont, Los Angeles) is called, sworn, and testifies for the defendant.

Leicester C. Chapman (Veterans' Administration, Sawtelle, Calif.) is called, sworn, and testifies for the defendant.

Kenneth Townsend (9949 Santa Monica Blvd., Beverly Hills) is called, sworn, and testifies for the defendant.

Arthur J. Nie (1050 Marco, Venice, Calif.) is called, sworn, and testifies for the defendant and Defendant's Exhibit A, heretofore marked for identification, is now offered and admitted in evidence. The defendant rests.

Witness Long is recalled and testifies in rebuttal in behalf of the Government. Witness Davis is recalled and testifies in rebuttal in behalf of the Government. Witness Duncan is recalled and testifies in rebuttal in behalf of the Government.

John Harder (1423 Ridgway, Los Angeles) is called, sworn, and testifies for the Government in rebuttal.

Pete La Tora (1835 W. 38th Pl., Los Angeles) is called, sworn, and testifies for the Government in rebuttal. Both sides rest.

At 4:50 P. M. the Court reminds the jury of the admonition heretofore given and declares a recess until 9:30 A. M., Dec. 13, 1946. [11]

[Minutes: Friday, December 13, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further jury trial of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present on bond; at the request of Attorney Neukom the Indictment is read by the clerk of the Court. Attorney Neukom makes opening argument in behalf of the Government. Attorney Sullivan argues in behalf of the defendant. Attorney Neukom makes closing argument in behalf of the Government.

At 11:05 A. M. the Court reminds the jury of the admonition heretofore given and declares a recess for a few minutes. At 11:45 A. M. court reconvenes and all being present as before the Court instructs the jury.

At 12:12 P. M. Bailiffs Brand and Strong are sworn to care for the jury during its deliberations upon its verdict and the jury thereupon retires to the juryroom in the custody of the said bailiffs.

At 12:15 P. M. the Court orders the jury taken to lunch and thereafter to return to the jury room for deliberation upon its verdict.

At 3:39 P. M. court reconvenes and all being present as before, including the defendant and the jury, and counsel so stipulating, the Court inquires of the jury if it has reached a verdict and the foreman replies that the jury has, and hands the verdict to the Court who thereupon orders that it be read in open court. The clerk reads the verdict and the Court orders that the jury be polled and each juror having replied that the verdict as read is his or her own verdict, it is [12] ordered that the said verdict be filed and spread upon the minutes, the said verdict as filed being as follows:

* * * * *

The Court orders the defendant committed to the custody of the U. S. Marshal and defendant's bond exonerated.

The jurors herein are excused from further attendance upon the Court in this case and are excused generally until notified.

On the Court's own motion it is ordered that this cause be referred to the Probation Officer for investigation and report and continued hereby to Dec. 30, 1946, at 2 P. M., for hearing the said report and for sentence on each of the two counts of the Indictment.

On motion of Attorney Neukom it is ordered that the \$100 in currency, marked as U. S. Exhibit 7, remain in the custody of the clerk until the date of sentence and time for appeal has expired. [13]

[Title of District Court and Cause]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Theodore S. Gage, guilty as charged in the first count of the Indictment, and guilty as charged in the second count of the Indictment.

Dated: Los Angeles, California, December 13, 1946.

HARRY D. DUDDING

Foreman of the Jury

[Endorsed]: Filed Dec. 13, 1946. [14]

[Title of District Court and Cause]

MOTION IN ARREST OF JUDGMENT

Comes now the defendant and moves in arrest of judgment on the following grounds, to-wit:

I. The indictment does not state facts sufficient to constitute an offense against the United States;

II. The court was without jurisdiction of the so-called offense in that the so-called offense, if any, does not come within U. S. C., Title 18, Sec. 207;

III. That the defendant was not properly represented at the trial in that all of the evidence available to counsel for the defendant was not submitted;

IV. That the defendant was not properly represented at the trial in that counsel for the defendant failed to make an opening statement to the jury, failed to make a motion for a nonsuit, failed to make a motion for a directed verdict, failed to [15] make a motion in arrest

of judgment, failed to make a motion non obstante verdicto, and failed to make a motion for a new trial.

Dated this 30th day of December, 1946.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Gage

Received copy of the within Motion in Arrest this 30 day of Dec. 1946. N. W. Neukom, Asst. Attorney for

[Endorsed]: Filed Dec. 30, 1946. [16]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now the defendant and makes this motion for a new trial on the following grounds, to-wit:

I. The court erred in excluding the evidence of John Doe Skill;

II. The verdict was contrary to the law and the evidence;

III. The presumption contained in the statute, as construed and applied in this case, is unconstitutional;

IV. Newly discovered evidence;

V. The defendant was denied due process of law, as guaranteed by Amendment V and Amendment VI of the Constitution of the United States.

Dated this 30th day of December, 1946.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Gage [17]

Received copy of the within Motion this 30 day of Dec., 1946. N. W. Neukom, Asst. Attorney for

[Endorsed]: Filed Dec. 30, 1946. [18]

[Title of District Court and Cause]

MOTION

Comes now the defendant, Theodore S. Gage, and moves the court for judgment of acquittal on each count of the indictment.

Dated this 30th day of December, 1946.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Sage [19]

Received copy of the within Motion this 30 day of Dec., 1942. N. W. Neukom, Asst. Attorney for

[Endorsed] Filed Dec. 30, 1946. [20]

[Title of District Court and Cause]

AFFIDAVIT OF JOSEPH J. CUMMINS IN SUPPORT OF MOTION FOR NEW TRIAL, MOTION IN ARREST OF JUDGMENT, AND MOTION FOR ACQUITTAL

State of California

County of Los Angeles—ss:

Joseph J. Cummins, being first duly sworn, deposes and says:

That he is an attorney at law, duly licensed to practice in all of the courts of the State of California and in the District Court of the United States, Southern District of California, Central Division, and in the United States Circuit Court of Appeals for the Ninth Circuit.

1. That on or about December 20, 1946, affiant was requested by a physician, a classmate of the defendant in medical school, to visit the County Jail where the defendant, Theodore S. Gage, is incarcerated. That at such time and place the defendant, Theodore S. Gage, recited the story of his employment at the Veterans' Administration at Sawtelle, County of Los Angeles, [21] California, from the time he was first there employed up to and including defendant's trial and conviction under the Indictment under U. S. C., Title 18, Sec. 207.

2. Affiant avers that at said time and place defendant requested affiant to make a personal investigation of the statements made to affiant by defendant, and that affiant, if convinced of defendant's sincerity, honesty and truthfulness, substitute himself in *in* the place and stead of defendant's then counsel.

3. Affiant avers that on or about the 28th day of December, 1946, affiant filed Substitution of Attorneys with the Clerk of the within Court.

4. Affiant avers that he has made an exhaustive investigation and check of the statements made to him by the defendant, and that said statements, in their important details, have been corroborated by disinterested persons, for the most part professional men employed by the government of the United States at the Veterans' Administration at Sawtelle, Los Angeles County, California.

5. Affiant avers that he had conversations with Dr. Ralph H. Kuhn, Dr. David Levine, Dr. Theodore Kane, Dr. Charles Strachan, Dr. M. J. Hurst, Col. Colebaugh, Lt. Col. Strayder, Mr. Fred Skill, and the lieutenant in charge of the records in the office of Chief of Police A.

F. Slaight of Long Beach, Los Angeles County, California.

6. Affiant avers that in a conversation with Dr. David Levine, Dr. Levine disclosed to affiant that the defendant Gage on more than one occasion stated to him (Dr. Levine) in the presence of Drs. Kuhn, Kane, Strachan, and perhaps Dr. Nigh, that he (defendant Gage) was working on something and/or was making an investigation with respect to what he suspected to be a pay-off by Tomsone, and that when he had concluded the said investigation there would be "fur flying" or there would be "hell popping", or [22] words to that effect. Affiant avers that he presented the within statement of Dr. Levine to Drs. Strachan, Kane and Hurst; that the said latter three doctors informed your affiant that they clearly remember defendant Gage making said statements in their presence and in the presence of each of them on "two or three occasions".

7. Affiant avers that Dr. M. J. Hurst stated to your affiant that defendant Gage told him that he (defendant Gage) suspected that Tomsone was paying somebody off and that he (defendant Gage) was trying "to get him".

8. Affiant avers that from affiant's conversations with various members of the medical staff of the Veterans' Administration hospital at Sawtelle, County of Los Angeles, California, it was common knowledge that the defendant was making a one-man investigation of what he suspected, to-wit, that said Hubert Tomsone was paying somebody off in order to preserve his (Tomsone's) exclusive contract with the Veterans' Administration for orthopaedic equipment. Affiant further avers that there

were at least three conversations at the Veterans' Administration hospital, where defendant was employed, at which defendant Gage stated to his colleagues there assembled (to which two of the doctors referred to as "bull sessions") that he (Gage) was making an investigation of alleged graft or pay-off and that when he (Gage) would have concluded said investigation there would be "fur flying" or "hell popping", or words to that effect.

9. Affiant avers that he was informed by at least three physicians who are still employed at the Veterans' Administration that defendant Gage stated to them that he (Gage) had written to Washington in this regard and that a response to defendant's letter had been received from Washington; that the said letter was intercepted by Dr. Long, defendant's superior, and that Dr. Long had called the defendant "on the carpet" for going over his head and for not "going through channels". [23]

10. Affiant is informed and believes, and upon such information and belief states, that the government's chief witness, Hubert Tomsone, was twice convicted of theft and served two sentences in the Long Beach City Jail as the result of such convictions; that affiant believes that the record of such convictions would be admissible under *Williams v. U. S.*, 3 F. (2d) 129, to impeach the character, testimony and credibility of the government's chief witness; that the jury was deprived of such evidence in weighing the testimony and credibility of the witness Tomsone.

Further deponent saith not.

JOSEPH J. CUMMINS

Subscribed and sworn to before me this 8th day of January, 1947.

AARON J. BLACKMAN

Notary Public in and for the County of Los Angeles,
State of California

[Endorsed]: Filed Jan. 8, 1947. [24]

[Title of District Court and Cause]

TRANSCRIPTION OF CONVERSATIONS BETWEEN JOSEPH J. CUMMINS AND DOCTORS THEODORE KANE, CHARLES STRACHAN, DAVID LEVINE, M. J. HURST, COLONEL STRAYDER AND RALPH H. KUHN [25]

Transcription of Conversation Between
Joseph J. Cummins and Dr. Kane

December 26, 1946

Dr. K Hello.

JJC Hello, Dr. Kane. My name is Joseph Cummins. I'm an attorney and also the editor of the B'nai B'rith Messenger.

Dr. K Yeh.

JJC I've been called in in the Dr. Gage matter to compile statements which Dr. Gage has made to me—are accurate, such as for example:

1. Dr. Gage tells me that he told you and perhaps Dr. Kuhn and Dr. Levine and Dr. Strachan that he had complained to Dr. Long that this

man Tomsone was trying to bribe him. Did he ever make such a statement to you?

Dr. K Not to me, no. No, look all that came up in the trial. The only thing that Levine, Kuhn and myself could testify to—and I think the testimony bears us out—was the fact that he went ahead and he did complain that the quality of Tomsone's work was not satisfactory and that on several occasions he'd gone ahead and complained about Tomsone's work and they'd gone ahead and stepped over his head and authorized certain stuff which he had refused, but as far as his bribing, he never mentioned it to me. I don't think he mentioned it to Kuhn and I don't think he mentioned it to Levine.

JJC Well was there any conversation around there about the word "bribery", doctor?

Dr. K No.

JJC And not to your knowledge—

Dr. K No.

JJC Uh huh. Did you— [26]

Dr. K That came out in the trial.

JJC Did you so testify at the time of trial?

Dr. K Not that I hadn't heard—that he hadn't told us. He had told us about the fact that he had raised "Hail Columbia" about Tomsone's work. Yes.

JJC Did you so testify?

Dr. K Yes.

JJC And did they ask you specifically whether or not you ever heard Dr. Gage complain about the fact that Mr. Tomsone was trying to bribe him?

Dr. K I think they did ask us that, yes.

JJC And did you—pardon.

Dr. K The answer to that I believe was that I didn't recall such a conversation.

JJC Uh huh.

Dr. K And I'd like to help the boy as much as I could but—

JJC Naturally and I don't want you to testify to anything that—

Dr. K We went up there and the things we did testify up there—are as I'm telling you now—about the fact that he had complained about the quality of his work and that he had told us that he had told the higher-ups about it and stuff like that—I mean it was just the stuff that we had testified to at the trial.

JJC Uh huh. Naturally I want you to understand me in this matter. I wouldn't ask you—

Dr. K I realize that.

JJC I wouldn't ask you to perjure yourself if his life were at stake. The only thing is that I did want to get—you know as we say in the law—the truth, the whole truth and nothing but the truth. All—

Dr. K As far as the statements were concerned we hadn't heard—he may have thought he mentioned them to us because after [27] all we did use his room as a sort of hang-out in the morning and kid around for five or ten minutes when we first started the day. He may have thought he told us about it but he didn't mention—because if he

did we would have probably told him to (record not readable) we would have fought about it or do something about it. We wouldn't let him go along the way he went. And I don't believe that any one of us—that

JJC Doctor, may I ask you this as man to man—and take it as such? Did (not readable) in the opinion of the boys out there—I don't want to get involved in a lost cause. Do they think he's guilty?

Dr. K They said he was a damn fool.

JJC Uh huh.

Dr. K That he may have tried to bust this thing wide open himself, but he sure used poor tact in doing it the way he did.

JJC Uh huh. Do they think that he is a grafter, the boys? Or just a damned fool?

Dr. K If he did I think it was something that was an emotional strain that came on afterwards. I think originally his intentions were probably all right and instead of trying to bust it himself—which was the impression he told us afterwards—was that they jumped the gun on him. I mean it was the feeling we had—that if he did try to bust this wide open he went about it in the—how should I word it—they jumped the gun on him—suppose I put it that way. And, but we feel that technically that Ted Gage was all right.

JJC Did the boys feel that his intentions were good?

Dr. K Yes, that his intentions were good.

JJC Uh huh.

Dr. K Whether anything actually happened afterwards or not, it may [28] have been one of those emotional things. A fellow comes back and makes a go of things and suddenly says "Ah, the hell with things. I can't seem to get to first base with the proposition. I go to the higher-ups and they don't do anything about it. The devil with it." Now whether that was the final thing or not I don't know. See what I mean?

JJC Uh huh.

Dr. K Well the fact remains he did take the money and he admitted it and they found it on him.

JJC He claims he was going to turn it in and they stopped him in the hallway and he talked and didn't get a chance to turn it in.

JJC Uh huh.

Dr. K I don't want to go pro or con on—but we like the fellow. That, of course, biases us a little bit.

JJC Yes.

Dr. K He is an extrovert and a good jovial sort of a fellow and we all liked him.

JJC Yes.

Dr. K There's the point. I think that basically he was foolish and in fact when I use the term "extrovert"—I mean that just about described him—a happy go lucky robust fellow, who doesn't care who he talks to, or what he says, and a likeable chap.

JJC Did you find him to be one of these reforming sort of fools? Going around trying to reform everybody and everything with which—with whom he came in contact?

Dr. K No, not necessarily a reformer. I mean—my contact with him medically. He—he wanted to practice good orthopaedics down there and he didn't like the rules and regulations that would bind him down. I mean he felt that if he wanted to do certain treatment he didn't have to abide by [29] the law or the letter there and say "Well you can't get it because you were discharged yesterday instead of tomorrow", or something like that. See what I mean.

JJC You bet.

Dr. K He practiced good orthopaedics. We really felt that he was a competent orthopaedic man—so that if any problems that come up from an orthopaedist's view point (not readable) sort of overlooked the little points of technicalities, whether the man was entitled to it or not. If we said "We have a case here Gage and we'd like you to do something" he'd go ahead and do it. He didn't ask if he was eligible for it or not.

JJC Uh huh.

Dr. K That's the kind of a guy he was.

JJC Uh huh. He is capable in his profession?

Dr. K I think if he did anything why he did it more as a sort of—well how should I word it—one of those crazy things that sometimes somebody does. Basically I don't think he is guilty.

JJC Uh huh.

Dr. K That's just my personal opinion—because if he was there were a lot of other chances, he could have done a lot of things down there.

JJC Uh huh. Well frankly, doctor, I appreciate your sincere and honest expression, but it's not grounds upon which to predicate a new trial.

Dr. K I don't know anything technical or legal about it.

JJC I know. I understand.

Dr. K I'm just (not readable) actually what we actually testified to in court—was that we knew him, he was a good doctor and that was all. [30]

JJC Uh huh.

Dr. K Theoretically I suppose we were character witnesses. But other than that we didn't know anything. I mean it amazed us when it actually happened. We had no—I had no inkling, of course, that anything like that was going on.

JJC Uh huh.

Dr. K At the time it did happen I said "Well if he did, he sure is a damned fool" and that was our impression, but we have always felt that we should give him the breaks on it and feel that he didn't do anything out of the way. But beyond that I really don't know what actually went on there, other than what's hearsay, and what I listened to at the trial.

JJC Uh huh.

Dr. K There's the story.

JJC But to the best of your knowledge he never came to you and complained that Tomsone was trying to bribe him.

Dr. K No, all he did was complain about the quality of his work. He did complain plenty about his work, that it was no good.

JJC He did, eh?

Dr. K Yeh. He was always complaining about the quality of his work.

JJC Uh huh. And were any of the other doctors there?

Dr. K If I'm not mistaken there would be half a dozen of us in the room. He'd come in and say "Well, gee whiskers, I had a case yesterday or this morning, or something, and that was sure a lousey job. He sure does this and he sure does that." I mean it was just general conversation.

JJC Uh huh.

Dr. K Nothing specific—I can't remember what day, or what case, or anything about it. Just general conversation.

JJC Uh huh. [31]

Dr. K But he would—

JJC He did, eh?

Dr. K Yes.

JJC Well thank you, doctor, and I hope to meet you personally some day.

Dr. K O. K.

JJC Good-bye. [32]

Transcription of Conversation Between
Joseph J. Cummins and Dr. Strachan
January 2, 1947

The first part of the record is not readable.

JJC Well you say he complained about Tomsone's work. The work was bad and that—did he say "He'd like to have a change—would like to have somebody else do it, or this, or that"?

Dr. S Oh, yes, things similar to that. Yes, that's true.

JJC Uh huh. He never mentioned to you that Tomsone was trying to bribe him?

Dr. S No, he did not.

JJC He said he mentioned it to a couple of the boys. I don't know whether you were meant amongst those couple of the boys.

Dr. S He never made any such statement to me at any time. I'm sure of that.

JJC Uh huh. I know that you'd be frank in stating so, doctor, if he had. Now may I ask you another question, doctor? I, of course, don't want to get involved in a losing cause and therefore I'm asking these questions because they'll guide me in whether I want to become affiliated with the case and help make a motion for a new trial, on the grounds of newly discovered evidence. That's—you know—one of those legal things.

. . .

JJC Did—I'll approach it from this angle. What's the general consensus of opinion among the fellows out there? Do they think he's guilty?

Dr. S Well, here—most of us that were in court and heard the testimony—I mean heard part of the testimony, thought he had a awful tough case to beat and we didn't think he had [33] much of a chance of getting anything but . . . what he got.

JJC Uh huh.

Dr. S Now, whether he's guilty or not, I don't know. That's something that's in his own mind and he knows the answer to that and nobody else does.

JJC Yes, he's about the only one, that's right.

Dr. S I couldn't say whether he's guilty or whether he's not guilty, but it would be a tough case for you to beat.

JJC Yes, I think so.

Dr. S The evidence is awfully strong—

JJC Yes. awfully strong against him.

Dr. S And I doubt if he could win an appeal.

JJC Oh, as its sits right now, I doubt it too. The only chance would be a motion for a new trial and that would be on the grounds of newly discovered evidence and, of course, that would have to be predicated upon some testimony that Mr. Sullivan didn't elicit at the time of the trial, such as the boys knew that he was trying to show it up because he told some of the fellows . . .

Dr. S That was the weakest point in his whole case. He said that he was playing private detective, but as far as I know he confided in no one, that he was trying to trap Tomisone.

JJC Uh huh.

Dr. S And that's . . . that's . . . if you could establish evidence that he was playing private detective and he accepted the money only—only to get Tomsone—to trap him—you'd have a case.

JJC Yes, that's right.

Dr. S For all I know, there is no such person in existence.

JJC Uh huh.

Dr. S And there's another thing that kind of weakens the case. [34] and that is that it was important enough for him to go downstairs to get a cup of coffee when there were a lot of patients waiting; it was important enough for him to go out to his car to get some papers that he was working on, while there were patients waiting, but after he had the money in his pocket, there were a lot of patients waiting in the hall and they were more important than getting rid of the guilt—getting rid of the money . . . and that is a hard thing to beat.

JJC That's a hard thing to try to make a jury swallow.

Dr. S That's right. I think that was the thing that swung the jury.

JJC Uh huh.

Dr. S I'd like to see him get off and I hope that—I hope there's some way out for him; and I'll never do anything to hurt him in any way, because as far as his treatment of me is concerned I never,

never saw anything out of the way; I never saw him do anything out of the way. I had no reason to believe he's guilty, but the evidence is—

JJC The evidence is very damning.

Dr. S That's right.

JJC Yes sir.

Dr. S He treated me fine. I have no complaints against him at all and I think he was trying to do a job out there.

JJC He is a damned good orthopaedist, isn't he?

Dr. S Yes, he is pretty good.

JJC And, of course, it takes about twenty-five years to manufacture a good orthopaedic surgeon and you hate to see them guillotined by one mistake like that. But—

Dr. S I hated—I mean I was awfully sorry to hear that he did get a conviction, but several of us that knew him fairly well out there—I mean—I didn't know him very well—I [35] just knew him for a couple of months—but the ones that were closest to him out there—we were talking about it the day before, and we didn't see how he could get out of it. . . . It was almost open and shut. The FBI had the evidence and he didn't have much to refute it on.

JJC Yes, that's right. It was his word against Tomsone's.

Dr. S Yeh, and Tomsone was working with the FBI for three weeks before . . . and Gage was working on his own. If he had confided in one

person—and told just one person about—Tom—
sone was offering him bribes, I think it would
have helped his case a lot.

JJC Uh huh.

Dr. S I don't know that person.

JJC Uh huh.

Dr. S But I hope you can help him out.

JJC I hope I can too doctor, but frankly the odds are
awfully great against him.

Dr. S That's right.

JJC Well thank you so much, doctor. You've been
very kind and frank and helpful.

Dr. S All right.

JJC Thank you and a very Happy New Year to you
and your family.

Dr. S Thank you, the same to you.

JJC Thank you, good bye. [36]

Transcription of Conversation Between
Joseph J. Cummins and Dr. Levine

December 26, 1946

JJC Hello, doctor. My name is Joseph Cummins. I'm
a lawyer and also the editor of the B'nai B'rith
Messenger.

Dr. L I see.

JJC I've been asked to help to see if something
couldn't be done for Dr. Gage.

Dr. L Oh, yes.

JJC And frankly as a Jew and a Jewish newspaper man I'm sympathetic. As a lawyer I have to face the facts and the law.

Dr. L I understand.

JJC And I wanted to ask you in all candor a couple of general important questions which might determine my decision whether or not I'll become involved in the case. That is, associated in the case.

Dr. L I'll try and help you.

JJC Right—Now I want you to know from the outset doctor that I don't want a damned thing from you that isn't the truth, the whole truth and nothing but the truth.

Dr. L You wouldn't get it.

JJC That's right. But I . . . even if I thought I could . . . I want you to know in advance that I'm not that kind of a guy. I'm not going to ask you to perjure yourself as—if his life were at stake—because you are a married man with a family and your whole future ahead of you, and if one man has made mistakes you don't have to stick your head in a noose to help him out. That's his funeral.

Dr. L Well I let him know that when he came to me originally . . . prior to the trial. [37]

JJC Uh huh.

Dr. L I told him I'd tell exactly what I knew and he didn't expect any more.

JJC Right. That's all I ever expect is the "emess" (Hebrew for absolutely truth). Now, doctor, this is a very important question and upon this question might turn whether or not we can get him a new trial.

Dr. L Uh huh.

JJC Did he ever, at any time, say to you that Tom-some was trying to bribe him?

Dr. L No.

JJC Did he ever indicate by any words that somebody was trying to give him some money?

Dr. L Not to my knowledge, no.

JJC Did he ever complain to you how bad Tomsone's shoes were?

Dr. L Oh yes, yes he mentioned that not only in my presence but that and several others at the same time.

JJC He did.

Dr. L Oh, yes.

JJC On more than one occasion?

Dr. L On several occasions.

JJC Uh huh. And did he say what he was going to do about it?

Dr. L Yes, he mentioned the fact that—that there was something . . . there was something fishy in Denmark—if I may use that term—

JJC Well sure.

Dr. L And that he was finding out certain things that were going on, and . . . although he didn't expand upon that—

JJC Uh huh.

Dr. L And that as a consequence there would probably be some fire works. That's about the way he put it. [38]

JJC He said there were going to be some "fire works"?

Dr. L Very likely he said there would be.

JJC Uh huh.

Dr. L And then he told me on one occasion that he had sent a letter to Washington.

JJC Uh huh.

Dr. L And, subsequently he told me that he had been called into the chief medical officer's office and had been informed that the chief medical officer there had received a reply to that letter but would not divulge it to him.

JJC Uh huh.

Dr. L The letter, in other words, went through indirect channels. He claims that he never saw that letter. That he never personally received a reply to it from Washington which was—made him rather indignant. He felt that this was a personal matter and he told them that he had not gone through channels.

JJC Uh huh.

Dr. L And that therefore the letter had been properly sent through the channels. That is the reply had been properly sent through channels. But he said the contents of the letter were not divulged to him. He was told to . . . more or less . . . keep out of things that didn't concern him . . . Something along that line.

JJC You are referring to Dr. Long.

Dr. L That's right.

JJC Uh huh.

Dr. L This is indirect—this is what Gage told us.

JJC Yes, naturally. "He told us." You mean there were others of you doctors present?

Dr. L Well I don't know whether at the same time or individually, [39] but Dr. Kane, Dr. Strachan, Dr. Kuhn were those to whom he talked mostly.

JJC When he made that statement to the other boys . . . uh . . . did he—were you there—were they there when he said there were going to be "fire works"?

Dr. L That I can't recall exactly.

JJC Uh huh.

Dr. L Because there were so many occasions on which we sort of got together for a little bull session you might say, while coming in and out, going in and out—I don't know—I don't recall each particular instant. But the others all had their say at the same time. I mean when they were on the stand they said substantially the same.

JJC Did you testify too?

Dr. L Yes, I was on the stand.

JJC Did they ask you that question specifically?

Dr. L Which one?

JJC Whether or not he complained to you about—or mentioned to you—that Tomsone was trying to bribe him.

Dr. L Yes, they asked me that question and I had to answer as I told you. That I did not know about that.

JJC Yes. Did you mention the fact the—

Dr. L They did ask me whether he had said in my presence that Tomsone's work was inferior and I said "Yes," because I did hear him say that.

JJC Did they ask you whether—about the "fire works" statement?

Dr. L No nothing was said about that.

JJC Uh huh. . . . Might I use that, because that might be a helpful phrase?

Dr. L Well how do you mean use it?

JJC Well I mean state that he had stated to Dr. Levine in the presence of others that he had written a letter to Washington [40] and that there was going to be some "fire works".

Dr. L Well I wouldn't say it along that—that as a consequence of the letter—there was going to be some "fire works".

JJC Oh! . . . How did he put it, doctor?

Dr. L Oh, he told me—well he mentioned even before that—as I recall it—that he had apparently hit upon something . . . and that he was going to follow it through.

JJC Uh huh.

Dr. L And that subsequently that there would probably be something along that line, but I don't recall—

JJC Uh huh.

Dr. L That wasn't said in reference to his letter to Washington.

JJC Uh huh.

Dr. L That may have preceded or followed that. I don't recall at that time.

JJC Well that's that. Would you have inferred from that doctor that he meant that there would be some "fire works"; that he was going to blow something open—is that the idea? Is that the inference?

Dr. L Well it's possible that that was it. But I couldn't swear to it—if someone asked me specifically just what he meant by it.

JJC Oh! No.

Dr. L I mean (not readable) an opinion and would still be only an opinion.

JJC Just from the inflection of his words and the way he said it, maybe the look on his face—that's what I meant.

Dr. L Now let's see where was I?

JJC After the trial you said—was there some conversation?

Dr. L Well no—I recall now that he made that similar statement after the first day in court. That is when he came down here with the investigator. Prior to my appearing on the [41] stand.

JJC Uh huh.

Dr. L But—or, rather, after his arrest . . . and while he was out on bail, I should say.

JJC Uh huh.

Dr. L About subpoenaing some books, etc., and he expected quite a lot to come out of it. But apparently it failed to materialize because there didn't seem to be any mention—

JJC Uh huh.

Dr. L Now I understood—or am I wrong—that you are going to apply for probation?

JJC Well that won't—that would be—

Dr. L That won't clear him.

JJC Well that won't be of any value at all because probation—he'd still be guilty of a felony and he'd be debarred from ever practicing medicine. His only hope is a motion for a new trial, and—

Dr. L That might take a year or more?

JJC And if granted a new trial and he's exonerated, that is—

Dr. L That's O. K.

JJC Then that is the only hope in the world and I thought if he had told one or two of the boys . . . that . . . as he told me the other day in jail—I went up there with an old classmate of his who's a prominent surgeon here—a classmate of his from Illinois—to whom he wrote a letter—and this surgeon is a client and friend of mine and he wanted to go up and see him so we hopped right in the car and went up to see him . . . and after all I have been in Jewish activities for thirty-one years and I want to be helpful . . . I want to be helpful if a man has a semblance of innocence; and I don't like to see a surgeon (record not readable) a quarter of a century (record not readable) . . . an [42] orthopaedic surgeon from the time he goes into school until he comes out and gets his practice and this and that—I don't like to see him guillotined by one little mistake—but the law doesn't take cognizance of one little mistake—a mistake is a mistake and there is no relativity about it—see—but if he told one or two of the boys that this fellow Tomsone is trying to bribe me—as he told me in jail—that's what happened—that's his story.

Dr. L I can't say that he ever mentioned that to me. Or I would have admitted it on the stand.

JJC Right, right, that's right.

Dr. L And . . . as a fact I don't think any of the others mentioned that it was—that he brought that fact out.

JJC But he did state to you, and maybe a couple of the others were listening, that "he's going to get to the bottom of the thing and that there'll be some fire works."

Dr. L Something along that line.

JJC To the best of your recollection, doctor, do you remember his expression?

Dr. L Well I said "fire works". Perhaps I should amend that. I mean that—

JJC To the best of your recollection what did he say? Maybe that one little thing—that you think right now is immaterial—might be the saving of Dr. Gage. See?

Dr. L Well you know what I'd probably have to sit down and pour over this thing to try and recall it.

JJC Do that.

Dr. L But at the time it seemed immaterial because it was . . . along the lines of so many other gripes that we have had . . . the thing sort of overlapped.

JJC Uh huh. [43]

Dr. L With one or two of the other fellows that were there at the time and kind of refresh ourselves on it.

JJC Will you do that tomorrow?

Dr. L I'll speak with—

JJC And I'll give you my office number here and my home telephone number and if there is anything you can do to refresh their memories—you can tell them they're not required to say anything that isn't the truth - - - and of course they won't—I'm not expecting it and they won't. But they might remember some damn fool little thing that he made a statement about—like—"Oh I'm working on something here, and when I get through there's going to be some fire works", and they'll think—they'll pass it off as a piece of bragadoccio of some extrovert, when in the—

Dr. L If I had any knowledge—anything of that nature which would be of any help I want to produce it. At the same time I'll try to figure out—whether—since I believe the whole trial revolved around intent—did it not?

JJC That's right.

Dr. L O. K. Couldn't they very readily claim that what he said at one time, or what he did at another, would have no relevancy—

JJC They are relevant. They're very material too. You betcha. A course of conduct you see . . . we must contradistinguish between intent and intention. See? And, of course, conduct is a governing thing. Then it becomes a matter of law—not fact alone.

Dr. L Assuming that a man felt one way at one time—and then another time decided to do just the opposite—

JJC Well, then, it's a question of law and mixed law and fact and it's up to a jury to determine. But in the meantime [44] it's got to be presented in that fashion. And if it wasn't then he is entitled to a new trial on the merits.

Dr. L I'm wondering whether—why his lawyer didn't try to bring that out then.

JJC I have my own opinions. Did you ever hear the famous Greek expression of (Here Mr. Cummins used a Hebrew expression meaning "he fumbled").

Dr. L Heh, heh, heh, quite so.

JJC Yes, sometimes those things happen—see. A fellow fumbles the ball—a Mickey Owen and the World Series turns on it—see . . . and the best of us can make a mistake.

Dr. L Uh huh.

JJC But—

Dr. L If the motion for trial—new trial—goes forward and is granted, is he then freed on bail again?

JJC Then he'll be out on bail again.

Dr. L I see.

JJC See—and if a new trial is granted on the grounds of newly discovered evidence—which this would be—newly discovered evidence—then—ah—there'd be a fifty-fifty chance of him being exonerated.

Dr. L Uh huh.

JJC And that I certainly—if there's that one chance in a million, I'd like to do it because as I said before it isn't easy to manufacture an orthopaedic surgeon—as I told the judge the other day—you could shoot a couple hundred thousand of us lawyers and the world would never miss us, but they would miss ten good orthopaedic surgeons. See?

Dr. L I see.

JJC So, if you'll be kind enough doctor and talk it over with the boys tomorrow—I'll try and get Dr. Kuhn again—and do you perchance know Dr. Nigh's telephone number?

Dr. L Dr. Nigh's? [45]

JJC Yes.

Dr. L No, I'm sorry to say I don't.

JJC Do you happen to know where he lives?

Dr. L He's in West Los Angeles. That is all I know.

JJC Uh huh, well I'll try to get him.

Dr. L That's N-I-G-H you know.

JJC Yes—I'll try and get Dr. Kuhn.

Dr. L You have talked with Dr. Kane.

JJC I have spoken to Dr. Kane and Dr. Strachan.

Dr. L Did they tell you the same thing?

JJC Substantially the same thing, excepting that he overlooked that one point about the: "I'm working on something here and there might be some fire works", or words to that effect. Now, if you fellows could get together and remember—refresh your memory on a little nonsensical thing that you might thing—that is—that could perhaps be the saving.

Dr. L We'd have to refresh because after all at the time it meant nothing to us.

JJC That's right—that's right.

Dr. L Other than just as I said—

JJC Well take my phone numbers doctor—

Dr. L All right.

JJC And I'll appreciate hearing from you during the day or tomorrow night. My office is TRinity 0431.

Dr. L TRinity 0 4 3 1.

JJC Joseph Cummins—C U M M I N S—or my residence is not listed so you better write that down. BRadshaw 24552.

Dr. L 2 4 5 5 2. All right, sir.

JJC Thank you very much, doctor. And a Happy New Year to you.

Dr. L Thank you, the same to you.

JJC Good bye. [46]

Transcription of Conversations Between
Joseph J. Cummins and Dr. Kuhn

Conversation of January 2, 1947:

JJC My name is Joseph Cummins. I'm an attorney. I've just been substituted in in the Dr. Gage case.

Dr. K Yes.

JJC Are you in a position to speak more or less freely right now . . . I want to ask you a couple of questions.

Dr. K Well—

JJC Or would you rather I spoke to you at home?

Dr. K What's that?

JJC Would you rather I spoke to you at home?

Dr. K Well, I'm not at home very much.

JJC Well, I'll ask you—Frankly, I'm trying to get Dr. Gage a new trial . . . and . . . I spoke to some of the other men in your department and asked them a couple of questions very frankly, and they're on these lines: "Did you ever hear Dr. Gage make the statement that he's making an investigation and that there'll be 'fur flying' or there'll be 'fireworks' or 'hell will be popping', or words to that effect?"

Dr. K Well, I tell you, Mr. Cummins. I don't know that I want to go into this thing. There are a lot of complicating factors entering into it, and I might be willing to talk to you some time but not now and not over the 'phone.

JJC All right. Any way you say, Doctor. Would you be kind enough . . . I gave you my home 'phone number, to call me at your convenience?

Dr. K All right, just one second . . . Now, what's the 'phone number?

JJC My office number is TRinity 0431.

Dr. K Just one second . . . TRinity [47]

JJC 0431.

Dr. K 0431.

JJC My residence is BRadshaw 24552.

Dr. K 245—

JJC 52

Dr. K 24552. I'll call you.

JJC And I'll appreciate it.

Dr. K Thank you.

JJC Thank you, sir.

Second Conversation: January 6, 1947

JJC Dr. Kuhn, this is Mr. Cummins.

Dr. K Oh, yes . . . yes. Uh-huh.

JJC This is January 6th, and my affidavits to Judge Hall have to be in on the 8th.

Dr. K Yah, well, now, I'll tell you, Mr. Cummins. I've talked this situation over with some of my people who are rather influential here in the city, and I believe I'd rather keep out of it.

JJC Oh, it's not a question, Doctor, of keeping out of it. I don't want to drag you into anything. I merely want to ask you one question . . .

Dr. K Well, I . . .

JJC And that is this. If you don't want to answer it, it's all right. "Did you ever hear—"

Dr. K Mr. Cummins, I don't care to get into it, and I agreed to call you, but then, talking things over . . . people advise me not to become involved. You see, I've been in court on this case and I feel that I don't care to go again.

JJC Well, "Did you ever here Dr. Gage—" [48]

Dr. K Well, I'll talk to you some other time, Mr. Cummins. Some time possibly when I'm free and you're free.

JJC Well, I'll have to subpoena you, Doctor, and take your deposition.

Dr. K O. K. Goodbye.

JJC Thank you, sir. [49]

Transcription of Conversation Between
Joseph J. Cummins and Dr. Strayder

(Jan. 2, 1947)

JJC Colonel Strayder, my name is Cummins. I am the new attorney for Dr. Gage.

Dr. S Yes.

JJC He tells me that he had some conversations with you whilst you were out there regarding certain conditions which obtained, that he discussed with

you. Mind you, my purpose in calling you, Colonel, is this. I'm trying to see if I can find sufficient grounds upon which to predicate a new trial, and the Court has given me a couple of weeks to gather this information, if any there is. Did he have any talks with you regarding Tom-sone, whether the—that Tom-sone was trying to bribe him?

Dr. S No, I didn't know anything about it.

JJC Did you ever hear him say that he was working on something that might blow the top off the thing?

Dr. S Well, right after I started to work down there I went off on leave. While I was working down there I didn't know just what was going on. He said the contract for the shoes was not good. He was trying to get the contract broken. He wanted the Government to buy shoes from anybody that would make them. When most of the things happened out there, I was off on leave. (Parts of the conversation too inaudible to be transcribed.)

JJC Did he ever have any conversations with you, Colonel? Don't think I am trying to harass you or press you. I'm merely gathering information. Did you have any conversations with him wherein he told you that he was working on—making an investigation—or words to that effect?

Dr. S I didn't know anything about that. While I was down there [50] we established a very nice connection, and as far as I know when I left there

(not audible) . . . When I came back I was transferred to another department . . . I didn't know what he was doing other than I thought he was just working like everybody else, trying to make a go of it. I didn't know he had anything in mind.

JJC Did he complain to you about the type of shoes that Tomson was delivering to the Hospital?

Dr. S Yes, that was common talk . . . Everybody knew that.

JJC Did he express himself that he thought perhaps Tomson was sticking there because he was paying somebody off?

Dr. S Well, he didn't know.

JJC He told me he told you that prior to his arrest.

Dr. S He might have mentioned it to me.

JJC Do you remember him saying that to you?

Dr. S Well, I couldn't say. Really, I wouldn't know for sure whether he did say that.

JJC He told you that he was working—making an investigation—or words to that effect.

Dr. S He talked about it all the time. Whether he had that in mind or not I couldn't be able to say for sure.

JJC Oh, no, of course, you couldn't tell whether he had it in mind. All I wanted to know—

Dr. S He had information there that he told me that he was positive that there was a payoff.

JJC He did tell you that?

Dr. S He never did, I say.

JJC He didn't tell you that?

Dr. S No, he didn't.

JJC Did he infer that he was working on something to discover that there was a payoff?

Dr. S No, no, he never did say anything— [51]

JJC Nothing that even sounded like that?

Dr. S No, I didn't know that he had that in mind at all.

JJC What was the worst he said about Tomsone and his shoes?

Dr. S They were lousy shoes, or words to that effect . . .

JJC He tells me that he told you that the only way a man could put shoes like that into the hospital is that he was paying somebody off. Do you remember him saying that to you?

Dr. S He might have, but if he did, of course, that would be merely a supposition.
(Inaudible conversation)

JJC How many times did he make such complaints to you?

Dr. S Oh, I wouldn't know. Probably one or two times, when he'd bring a shoe over there for me to look at . . . he turned them down . . . I wouldn't know. The veteran wouldn't like the shoe and he would bring it back in. He'd send them back and have them fixed over.

JJC And during that conversation he might have said to you that the only way a man could bring a

shoe like this into the Administration would be that he's paying somebody off, or something like that?

Dr. S I don't recall that. I don't recall him ever saying that. I wouldn't know.

JJC He might have said it?

Dr. S He might have said it in just ordinary conversation . . . He was driving at an investigation—to find out what, I didn't know . . . We couldn't do anything about it. All we could do was holler about it. We all did that. He didn't let the contract. He didn't have anything to say about it.

JJC He had no authority to make or break the contract anyhow.

Dr. S No, no. . . . It didn't matter.

JJC Wasn't it common knowledge among the young doctors there in that department that Gage was working on some kind of an investigation? [52]

Dr. S I couldn't tell you.

JJC In the bull sessions, some of the boys tell me he told them—several admitted—"I'm working on something", or words to that effect, and "One of these days there's gonna be some fireworks around here". Did you hear that?

Dr. S I didn't recall. I don't recall that at all.

JJC You were never in any of those bull sessions, were you?

Dr. S No.

JJC But you do recall that one or two or three times—I think you said once or twice—that he told you that the only way a fellow could bring shoes like that in here would be that he was paying somebody off.

Dr. S No, I don't think so. Whenever he'd say that he just wondered why they allowed such shoes to be made there. But as far as there had ever been any bribery or anything like that, it had never been brought up—at least, not to my knowledge.

JJC Thanks a million, Colonel. You've been helpful and frank. Goodbye. [53]

Transcription of Conversation Between
Joseph J. Cummins and Dr. Strachan

January 2, 1947

Dr. S Hello.

JJC Hello, this is Joseph Cummins. Remember I called you last week at home regarding Dr. Gage.

Dr. S Yes.

JJC I just want to ask you another question that didn't come up at that time, doctor. Talking to Dr. Levine and Dr. Hurst they told me something that sounded insignificant to them but it might be an important item, and that's this: That during their bull sessions around the hospital Dr. Gage made the statement on more than one oc-

casion that he is working on something and that one of these days hell will be popping or there'll be fur flying, or words to that effect. Did you hear such a statement?

Dr. S Well I don't remember anything specific.

JJC Not specific, but something that sounded like that.

Dr. S Oh, yes, sort of intimated something like that.

JJC Uh huh. That—you don't remember the exact words—that's what you mean.

Dr. S No I don't remember any exact words.

JJC No. But the idea, you do recall him having made such a statement?

Dr. S Yes.

JJC How many times, Dr. Strachan, would you say he said it?

Dr. S Oh, I can't remember.

JJC Was it more than once?

Dr. S I don't remember that.

JJC But it was at least once.

Dr. S Yes. [54]

JJC Well thanks a lot, doctor. You've been very helpful and I appreciate it.

Dr. S You're welcome.

JJC Thank you, good-bye. [55]

Transcription of Conversation Between
Joseph J. Cummins and Dr. Hurst

January 2, 1947

Hello.

JJC Dr. Hurst?

Dr. H Yes.

JJC My name is Joseph Cummins. I'm Dr. Gage's new attorney. I wanted to ask you a question, because on this question might be predicated our ability to get him a new trial. Did you ever hear in any of the bull sessions or discussions around there, did you ever hear Dr. Gage say that he was making an investigation, and that there might be "fur flying" or "hell popping", or words to that effect?

Dr. H Yes sir, I heard some—

JJC How many times have you heard him say that?

Dr. H Well I'd say at least two times, maybe three.

JJC Can you recall, doctor, who all was present when he made those statements? Was Dr. Kuhn there?

Dr. H I think he was. I know—

JJC Was Dr. Levine there?

Dr. H I think he was. I know it happened—once when I was—when just the two of us were alone.

JJC Uh huh. Did he ever tell you that he was trying to get Tomsone; that he felt that Tomsone was paying somebody off and he was trying to get him?

Dr. H Yes, uh huh.

JJC How many times did he tell you that?

Dr. H It is difficult for me to say—(record not readable).

JJC In these other conversations—did he ever say “I’m almost through with my investigation and one of these days I’m going to let it pop”, or words to that effect? [56]

Dr. H No, I don’t recall that.

JJC Can you identify possibly some of the men who were present when he made that—the statement about he’s making an investigation? You said you believed Dr. Kuhn was there. Dr. Levine told me he was there and he heard it and he gave me your name and he said he was sure you were there.

Dr. H At least one of the times, just the two of us were together.

JJC Uh huh.

Dr. H And the other times there were others there. I think it was Dr. Levine and perhaps Dr. Kuhn came.

JJC Uh huh, was Dr. Strachan there?

Dr. H I don’t—

JJC Or Dr. Nigh?

Dr. H No, I don’t think Dr. Nigh was.

JJC Uh huh.

Dr. H If he was he might not have heard because he is a little deaf.

JJC Uh huh. Do you remember whether Dr. Strachan was there?

Dr. H I couldn't be too sure of that.

JJC Dr. Levine says he was. That's why I wanted to tie it up with somebody else too.

Dr. H Well he might have been.

JJC You don't remember that?

Dr. H But I'm not too sure that he was.

JJC Well thank you, doctor. I'll let you know what happens and I'm going to try to get him a new trial.

Dr. H Well I hope you're able to.

JJC Because based upon this evidence I don't think all the facts were brought out at the time of the trial.

Dr. H I see.

JJC Thank you very kindly. Doctor, what is your home phone? [57]

Dr. H My home phone is Hillside 2094.

JJC 2094. Thank you. In case I want to call you in the evening.

Dr. H Very well.

JJC Thank you doctor. [58]

Transcription of Conversation Between
Joseph J. Cummins and Dr. Kane

January 2, 1947

JJC This is Mr. Joseph Cummins again. I spoke to you about Dr. Gage.

Dr. K Yeh.

JJC There's one thing that came up. Dr. Levine called my attention to it and it seemed insignificant to him at the time but it's a very important piece of information in helping to get Dr. Gage a new trial and I want to check it with you. Dr. Levine told me, as did Dr. Hurst, that during one conversation, a bull session so to speak, amongst the fellows in one of the offices there, Dr. Gage made the statement that he's working on something and that—aah—inferring an investigation. That one of these days there'll be "hell popping", or "fur flying", or words to that effect. Were you present when such a statement was made?

Dr. K I don't recall. He, of course, kept bitching all the time about the quality of the work. That was the most of his complaint.

JJC Yes. Yeh, that we know. But the main thing is the inference that he was making a one man investigation. That's what I'm interested in. Do you remember such a statement?

Dr. K Not as such, no.

JJC What—as close to the language as you can get it or recall it—what did he say?

Dr. K I don't recall that particular—I mean we had a lot of sessions up there you know.

JJC Yes. Of course, I don't want you to guess at anything. I want something more or less accurate to the best of your recollection. Were you present at any of those conversations [59] when Gage made the statement "I'm working on something now—it won't be long, and there'll be hell a popping around here, or fur will be flying, or something like that"?

Dr. K I don't recall it as such. I know that he was trying to—how should I word it—he was complaining about the quality of the work, and he was checking on that. That was most of the gist of his conversation. You know that letter that he wrote.

JJC Yes.

Dr. K It was in reference to that.

JJC Uh huh.

Dr. K That was about the only thing that he said he had written in regard to some circular or something. I mean he told us about that. And that was about all. It's apparently all this conversation was in reference to that. He was waiting for that letter to come through or something.

JJC Uh huh.

Dr. K And when he did come he said that that letter had come through.

JJC Uh huh.

Dr. K A day or so before he was picked up here. You know.

JJC Uh huh.

Dr. K But I think it was in reference to that that he did most of his talking.

JJC Uh huh.

Dr. K That was the time he was—

JJC Well, what I was particularly interested in is the statement that he had made in the presence of—he said you were there—and Dr. Levine—and Dr. Strachan recalls it. Dr. Levine recalls it. Dr. Hurst recalls it and they mentioned that they thought that you were there too when he said—My impression was that it was in reference to that letter [60] that he was waiting for word from Washington.

JJC Uh huh. Well, did you get the inference that he was making an investigation—that he was trying to get Tomsone?

Dr. K Well if he got that letter it was in regard to some contracts. That was the letter that he implied—

JJC Uh huh.

Dr. K He was trying to get some information about the contracts—That was the letter—

JJC Well, don't think I'm trying to pin you—

Dr. K But I'm also trying to be fair about it.

JJC Oh, I want you to be fair, and I want you to be as absolutely impartial and objective as you can be, doctor, but I merely want to pin you down if you were present when that particular conversation took place—where Gage stated “I'm working on something fellows, it won't be long now and there'll be hell a popping around here.

Dr. K Not as such. My impression is that any time I heard him make anything—might imply anything like that—was when he was trying to get this letter.

JJC Uh huh.

Dr. K That he had gone around trying to find this circular letter. That it wasn't around. Then he had written to Washington.

JJC Uh huh.

Dr. K Then I remember when he came back and said there had been an answer to that letter and he wasn't told what it was—something like that—I mean the stuff that you already know.

JJC Uh huh.

Dr. K My impression was that he was waiting for that letter and there would be some hell to pay in regard to the contracts, etc. Something he was trying to find out about those—

JJC Uh huh. [61]

Dr. K Gone upstairs looking for them. Couldn't find them and then had written to Washington direct.

JJC Uh huh.

Dr. K That was my impression as to what he was implying.

JJC Well I appreciate it very much, doctor, and thank you very much and a Happy New Year to you.

Dr. K Thank you.

JJC Good-bye. [62]

Recd 1 copy of the within transcription of recorded conversations this 23rd day of January, 1947. James M. Carter, U. S. Attorney; by V. Bonhus.

[Endorsed]: Filed Jan. 23, 1947.

[Endorsed]: Filed Jan. 24, 1947 as Exhibit "B" to Affidavit of Joseph J. Cummins, Esq., Filed Jan. 8, 1947. [63]

[Title of District Court and Cause]

AFFIDAVIT OF HOWARD H. DAVIS IN OPPOSITION TO MOTIONS MADE BY DEFENDANT

State of California

County of Los Angeles—ss:

Howard H. Davis, being first duly sworn, deposes and says:

That he is a Special Agent of the Federal Bureau of Investigation assigned to the Los Angeles Office.

That the interviews of the persons specifically named hereinafter were all conducted on the properties of the Veterans Administration, at a place commonly known as Sawtelle, California, at or between the dates of January 10th to and including January 13, 1947.

1. That pursuant to the directions of Norman W. Neukom, Assistant United States Attorney, your affiant first read the Affidavit of Joseph J. Cummins filed herein and also a portion of the material reflected in Points and Authorities filed by the defendant. That after so doing, your affiant conducted an investigation and interviewed certain persons as will appear more fully hereafter.

2. In interviewing all of the aftermentioned persons, and during the course of such interview, your affiant advised all of said individuals [64] substantially as follows: That Dr. Gage, the defendant, was entitled to any testimony or evidence that they might be able to furnish on his behalf, and that there was no desire to prevent the presentation of any such testimony upon the part of the government, and that they should feel free to give such

testimony if they had it, and that the purpose of the interview by your affiant was to ascertain the true facts within their knowledge.

3. That referring to paragraph designated as 6, page 2 of the Cummins Affidavit, your affiant on or about the 10th day of January, 1947, interviewed Dr. David Levine, having first read said paragraph No. 6 to Dr. Levine. Dr. Levine stated to affiant that part of the material as contained in said paragraph was true and part was not. Dr. Levine further stated that he did not say that defendant said he was making an investigation of a payoff by Tomsone, and that he did not recall in whose presence statements were made. He quoted Dr. Gage as saying that he had stumbled or come upon something in which he was in the process of investigating, and that he, Dr. Levine, believed he, Dr. Gage, had said something in regard to certain alleged irregularities and that after he, Dr. Gage, was through investigating, there would be a big blow up. Dr. Levine advised he did not recall Dr. Gage saying he suspected a payoff by Tomsone, nor that he, Dr. Gage, was investigating it. Dr. Levine further related that Dr. Gage had mentioned that he had written a letter to Washington, the contents of which were not divulged to Dr. Levine, and that later Dr. Gage had told him, Dr. Levine, that Dr. Long had received an answer and had called him in and that they had some words. Dr. Levine advised that it was not common knowledge to him, Dr. Levine, that Dr. Gage was making an investigation of a payoff by Hubert Tomsone. He advised that Dr. Gage complained of Tomsone's work. Dr. Levine stated that the attorney for Dr. Gage, who he described as the "new attorney" had asked him several times if Dr. Gage had

made a statement relative to investigating Tomsone in regard to a payoff and each time he told him, the attorney, no.

4. Dr. Strachan likewise was interviewed after having first had read to him paragraph 6 of the Cummins Affidavit. Dr. Strachan replied substantially as follows:

"That is not what I said. I did not remember any specific [65] statements on his part (referring to Dr. Gage). I did hear him say words that inferred that he felt there was something funny going on and he was trying to get to the bottom of it. It was not particularly in reference to Tomsone. He referred to Milligan as well as the shoe deal. He said several times that he, Dr. Gage, thought that someone higher up in the Administration was being paid. He felt there was some reason Milligan had the contract for the braces and Tomsone for shoes. He had never told one soul, to my knowledge, that Tomsone had ever bribed him in any way. He, Dr. Gage, said he wanted to get Dr. Long and Dr. Willett out of here."

Dr. Strachan stated that after Dr. Gage was apprehended, he asked him, Dr. Gage, if he had taken the money. He stated that he, Dr. Gage, replied that he knew nothing about it. However, according to Dr. Strachan, later Dr. Gage and his attorney stated that he, Dr. Gage, had accepted the money to trap Tomsone. (This statement was made prior to trial, and during the course of investigation.) Dr. Strachan stated that he did not recall any specific statements by Dr. Gage, and that Dr. Gage never mentioned Tomsone specifically but he, Dr. Strachan, al-

ways took his statements to refer to Tomsone and Miligan. Dr. Strachan further stated that Dr. Gage had never mentioned anything to him about writing a letter to Washington.

5. Dr. T. J. Kane was interviewed, paragraph 6 of the Cummins Affidavit was read to him, after which he stated to your affiant substantially as follows:

Dr. Kane stated that Dr. Gage had never made a statement as to an investigation of Tomsone because of a pay-off. Dr. Kane advised that he recalled that Dr. Gage had stated that he had sent through a letter to Washington relative to a circular letter which was supposed to have been put out by the Veterans Administration, the contents of which letter or what it related to being unknown to Dr. Kane. He, Dr. Kane, also stated that as a result of Dr. Gage's sending the letter, he was "bawled out" by Dr. Long, and that prior to the bawling out, Dr. Gage had stated in effect: "I'm trying to get hold of a circular letter. I can't find out about it. Practically all circular letters are on file upstairs [66] except this one. I've written to Washington, I'll sure raise hell when I get it." Dr. Kane also stated that most of Dr. Gage's conversations were in regard to the circular letter and that he never mentioned Tomsone aside from complaining about his work. He, Dr. Kane, stated that he did not know that it was common knowledge that Dr. Gage was making an investigation of a payoff by Tomsone and he, Dr. Kane, further stated to affiant: "When you ask about Tomsone by name, I say No; circular letter, Yes."

6. Your affiant interviewed Dr. M. J. Hurst, and read to him paragraph 7 and interrogated him generally with respect to the contents of the material reflected in para-

graph 6 of the Cummins Affidavit, after which Dr. Hurst stated to your affiant substantially as follows:

Referring specifically to paragraph No. 7, Dr. Hurst at first verified that Dr. Gage had made the statement; as to place and time, stating that it occurred in Dr. Gage's room at the Veterans Administration hospital about a month after he, Dr. Gage, came to the Veterans Administration. As to who was present, Dr. Hurst stated that Drs. Levine, Strachan, Kane and Kuhn were present when the statements were made, but later qualified this by stating that the statement was not necessarily made at one time but during the course of several conversations and that all of the above mentioned doctors were present at one time or another, but not necessarily together at the same time. In response to a question from your affiant as to what Dr. Gage had specifically stated, Dr. Hurst related that he had said that a lot of things going on did not seem right to him and that somebody was being paid for work which was not real first quality. Affiant asked Dr. Hurst if he knew that Dr. Gage had the authority to reject work and he stated that he had indicated that he, Dr. Gage, did not know he had such authority as shown by the fact that he did not reject it himself. Dr. Hurst also stated that Dr. Gage had said that he, Dr. Gage, had written a letter to Washington relative to a Veterans Administration circular he couldn't find in the file, but which he, Dr. Gage, knew had been put out. Dr. Hurst advised that the only thing Dr. Gage had said about Tomsone was that his work was inferior. He, Dr. Hurst, then stated in response to specific questions from your affiant that Dr. Gage did not specifically mention that he was investigating Tomsone; [67] that he, Dr. Gage, did not say he was trying to get Tomsone;

that he, Dr. Gage, did not say he suspected Tomsone was paying somebody off, but that his, Dr. Gage's conversation was general. After Dr. Hurst had made the last few mentioned statements above reflected, your affiant called attention that said answers were in conflict with those given at the initial part of the interview to which Dr. Hurst then stated substantially as follows: That he could not verify the material contained in paragraph No. 7 of the Cummins Affidavit, which was again shown to him, but went on to state that he, Dr. Hurst, did know that Dr. Gage had said that he was investigating something and a day or so later, he, Dr. Gage, had said that he had written a letter to Washington.

7. Paragraph 6 of the Cummins Affidavit was read to Dr. Kuhn by your affiant, after which Dr. Kuhn stated substantially as follows:

Dr. Kuhn advised that the attorney for Dr. Gage had called him on the telephone and asked him the question as just read to him from paragraph 6 relative to a payoff and that he had advised the attorney that he didn't want to discuss it over the telephone but would call back. Dr. Kuhn related that he was very busy and did not get a chance to call the attorney back, and that the attorney called him again and he, Dr. Kuhn, again refused to answer over the telephone and advised the attorney that he did not care to be involved in the case, upon which the attorney said that he would have to subpoena him. Dr. Kuhn advised your affiant that Dr. Gage had stated on several occasions that he was dissatisfied with things at the Veterans Administration but that other than that he said nothing. Dr. Kuhn stated further that Dr. Gage

never mentioned any investigation of a payoff by Tom-sone or graft or any sort of investigation in his presence.

8. Your affiant in conducting the investigation in connection with the material set forth in paragraph 9 of the Cummins Affidavit, called at the office of Dr. Long at the Veterans Administration and interviewed Miss Ellis, the Secretary-Clerk to Dr. Frank W. Long, Chief of the Out-Patient Department, making inquiry if their files reflected a letter generally described in paragraph 9 of the Cummins Affidavit. Said Miss Ellis made a search of the files and produced for your affiant a letter dated September 5, 1946 directed to one Mr. Bura, [68] apparently signed by one Theo. S. Gage, M.D. and made a copy of such original letter: attached to this Affidavit marked "Exhibit A" and by this reference made a part hereof is a copy of such letter so provided. That in addition thereto, the said Miss Ellis provided your affiant with a copy of letter dated September 25, 1946 apparently signed by C. M. Colebaugh, M.D., Chief Out-Patient Section directed to Manager, Veterans Administration, Regional Office, Los Angeles 25, California. Said Miss Ellis stated that said letter was apparently in reply to the letter referred to as "Exhibit A". A copy of said last mentioned letter is attached hereto marked "Exhibit B", and by this reference made a part hereof.

9. Your affiant interviewed Lt. Col. Strayder, Veterans Administration, and read to him that portion of material from defendant's Points and Authorities noted on page 7

designated as paragraph (3) to which Col. Strayder replied substantially as follows:

That he, Col. Strayder, did not pay any attention to what Dr. Gage had said because he was always grumbling about the quality of the shoes, but that he, Dr. Gage, had never made any statement that he, Dr. Gage, thought there was a payoff going on or that he was making an investigation of any kind. Col. Strayder stated that he rather questioned that Dr. Gage had made such a statement to him, since he was sure that if it had been impressed upon him that if any bribery or such matter was going on, that he would have reported it immediately to his, Strayder's, superior. He advised that when he talked to Mr. Cummins that he had meant that Dr. Gage had made so many statements that he had paid no attention and consequently did not know what he might have said. But that it was not his knowledge that Dr. Gage had made such a statement as set forth in said paragraph (3). Col. Strayder further related that he was contacted prior to Dr. Gage's trial by Dr. Gage and his attorney, and given a series of questions which he could not answer as he knew nothing about them. Col. Strayder stated that at that time, Dr. Gage had said that he, Dr. Gage, did not think he, Col. Strayder, would know as he was not there when it happened. Col. Strayder also related that it was not common knowledge to him that Dr. Gage [69] was making any kind of an investigation at the Veterans Administration.

Subscribed and sworn to before me this 17 day of
January, 1947.

MARY M. DONETTI

Notary Public in and for the County of Los Angeles,
State of California [70]

EXHIBIT "A"

COPY

VETERANS ADMINISTRATION

Los Angeles 25, Calif.

In reply refer to:

September 5th, 1946

Mr. Bura

Chief of Prosthetics

Dept. Medical & Surgical

Veterans Administration

Washington 25, D. C.

Dear Sir:

As Chief of the Out Patient Orthopedic Section at this facility some confusion has arisen to the validity of contractors form for furnishing veterans with prosthesis.

Many of these men have come in requesting the free choice of manufacturers. Under present set up here we are limiting to ten contractors only. It has come to my attention that on February 20th, 1946 you issued a letter to the effect that the veteran had free choice.

Is that still in effect and can you enlighten me as to the present set up. I would appreciate any circular letters pertaining to the subject.

Yours truly,

/s/ Theo. S. Gage, M.D.

Theo. S. Gage

Chief Out Patient Orthopedic Service [71]

EXHIBIT "B"

COPY

Branch Office 12

VETERANS ADMINISTRATION

180 New Montgomery Street

San Francisco 5, California

September 25, 1946

In reply refer to: SF10DD

Manager

Veterans Administration

Regional Office

Los Angeles 25, California

Dear Sir:

Your attention is invited to the inclosed letter dated September 5, 1946 from the Chief of the Out-Patient Orthopedic Service at your office in regard to the question of amputees' free choice of manufacturers which was sent by Dr. Gage directly to the Central Office.

The Acting Director Prosthetic Appliances Service has advised as follows:

"Please be informed that this office is contemplating a Veterans Administration circular clearly defining amputees' entitlement for artificial limbs as well as any free choice of such items. However, such a circular must receive concurrence from all interested Services as well as the approval of the Administrator of Veterans Affairs. Until these concurrences and approval have been obtained, the established procurement policy for artificial limbs must necessarily be binding for field stations. Possibly the authority contained in the All-Station Letter of May 22, 1945, subject: Prosthetic Appliances, will assist the field stations in furnishing beneficiaries with non-contract limbs without prior authority from this office. Otherwise it is suggested that the field station concerned request authority through channels for procurement of non-contract limbs requested by veterans."

For the Branch Medical Director:

/s/

C. W. COLEBAUGH, M.D.

Chief, Out-Patient Section

Incl 1

[Endorsed]: Filed Jan. 20, 1947. [72]

[Minutes: Friday, January 24, 1947]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further hearing on motion of defendant, Theodore S. Gage, for a new trial; motion in arrest of judgment, and motion for judgment of acquittal, pursuant to motions filed December 30, 1946; and for hearing on report of the Probation Officer and sentence of the defendant on counts 1 and 2 of the Indictment; Norman W. Neukom, Esq., Asst. U. S. Attorney, appearing for the Government; Joseph J. Cummins, Esq., appearing for the defendant, and the said defendant being present in custody:

The Court discusses with Attorney Cummins the said motions, and Attorney Cummins argues in support thereof. On stipulation of counsel, and order of the Court, Exhibits A and B to the affidavit of Attorney Cummins, filed January 8, 1947, are ordered filed.

Attorney Neukom argues in opposition to the motions.

The Court makes a statement and orders each of the said motions for a new trial, in arrest of judgment and for acquittal denied.

At 11:10 A. M. court recesses and reconvenes at 11:15 A. M., all present as before; the defendant is present.

The Court pronounces judgment against the defendant as follows:

* * * * * [73]

District Court of the United States
Southern District of California, Central Division

No. 19,055

Criminal Indictment in two counts for violation of
U. S. C., Title 18, Sec. 207

UNITED STATES

v.

THEODORE S. GAGE

JUDGMENT AND COMMITMENT

On this 24th day of January, 1947, came the United States Attorney, and the defendant Theodore S. Gage, appearing in proper person, and by counsel, Joseph J. Cummins, Esq., and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: (ct 1) that on or about Oct. 3, 1946 at West Los Angeles, Los Angeles County, California, defendant acting on behalf of the U. S. as orthopedic physician, U. S. Veterans' Administration Center, did ask for a bribe of \$100 from one Hubert Tomson with intent to have defendant's decision and action influenced thereby on matters of prescribing corrective footwear for patients at said center; (ct 2) that on or about Oct. 18, 1946, at said place, defendant in said capacity, did accept and receive a bribe of \$100 from said Tomson with intent to have decision influenced, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year in an institution to be selected by the Attorney General or his authorized representative, and pay unto the United States of America a fine in the amount of \$1.00, on count 2; and for the period of one day in an institution to be selected by the Attorney General or his authorized representative, and pay unto the United States of America a fine in the amount of \$1.00, on count 1; imprisonment under said sentence on count 1 to begin and run concurrently with the first day of said sentence on count 2, so that the maximum time served shall be one year, and the maximum fine paid shall be \$2.00.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) PEIRSON M. HALL

United States District Judge

The Court recommends commitment to

A True Copy. Certified this day of

(Signed)

Clerk

(By)

Deputy Clerk

[Endorsed]: Filed Jan. 24, 1947. [74]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that Theodore S. Gage, the defendant in the above entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this Court on January 24, 1947.

Dated January 28, 1947.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Gage

Received copy of the within Notice of Appeal this 28 day of January, 1947. James M. Carter, U. S. Atty., by V. Bonhus, Attorney for Plaintiff.

[Endorsed]: Filed Jan. 28, 1947. [75]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 83 inclusive, contain full, true and correct copies of Indictment; Minute Orders Entered December 2, 1946, December 10, 1946, December 11, 1946, December 12, 1946, December 13, 1946; Verdict; Motion in Arrest of Judgment; Motion for New Trial; Motion for Judgment of Acquittal; Affidavit of Joseph J. Cummins in Support of Motion for New Trial,

Motion in Arrest of Judgment and Motion for Acquittal and Exhibit "B" thereto; Affidavit of Howard H. Davis in Opposition to Motions Made by Defendant; Minute Order Entered January 24, 1947; Judgment and Commitment; Notice of Appeal; Designation of Contents of Record on Appeal; Order Extending Time to File Record on Appeal; Appellee's Designation of Additional Portion of Record on Appeal; Affidavit for Order for Transmission of Original Exhibits and Order for Transmission of Original Exhibit which, together with copy of Reporter's Transcript and Original Exhibits Nos. 1 to 9, inclusive, of Plaintiff, Defendant's Exhibit A and Exhibit A to the Affidavit of Joseph J. Cummins in Support of Motion for New Trial, etc., transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$21.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of March, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS
ON TRIAL

Los Angeles, California

December 10, 1946

Appearances:

For the Plaintiff: James M. Carter, United States Attorney, Los Angeles 12, California; by Norman W. Neukom, Assistant United States Attorney.

For the Defendant: S. Ward Sullivan, Esq., 412 Chester Williams Building, Los Angeles, California.

Los Angeles, California, December 10, 1946; 2:00 o'clock P. M.

* * * * *

The Court: Are we ready in the Gage matter?

Mr. Sullivan: Ready for the defendant, your Honor.

Mr. Neukom: Ready for the Government.

The Clerk: No. 19055, Criminal; United States v. Theodore S. Gage for trial.

Mr. Neukom: The Government is submitting its proposed instructions.

The Court: Very well.

The Clerk will fill the box.

(Whereupon a jury of 12 were duly impaneled and sworn.)

The Court: The remaining jurors are excused until notified.

Mr. Neukom, do you care to make an opening statement?

Opening Statement in Behalf of the Government

Mr. Neukom: May it please your Honor, counsel, ladies and gentlemen: At this time it is the privilege of the Government, or the one who represents the Government, to make an opening statement. In a case of this character, it is not my desire to make an extended statement. What I say at this time should not be interpreted as any evidence. You will accept only that evidence which is admitted from the witness stand, so if I make any allusions to facts and the evidence [4*] does not prove those facts, do not accept my statement either for the Government or against the Government.

Now with respect to any legal aspect of this case, the same holds true, as counsel for the defense advised you. You must accept the law from the Court after all of the facts have been heard.

It is the position of the Government that the Government will prove that this defendant, Dr. Gage, violated a particular Federal statute as charged in two counts of this indictment which was read to you. The Government proposes to prove beyond a reasonable doubt that on or about October 3, 1946 the defendant while employed at the Veterans Facilities here at the place that we commonly refer to as Sawtelle, did solicit from one Hubert Tomsone, a man who had the orthopedic contract to provide shoes for outpatients, that is, veterans who were not living at the Facilities but who, for some reason or other, had peculiarities or trouble with their feet; that this man, Mr. Tomsone, operating as Hubert's Ortho-

*Page number appearing at top of page of original Reporter's Transcript.

pedic Service, had the contract to provide shoes for this Facility and also for others.

We believe the evidence will prove that Dr. Gage was engaged as an orthopedic doctor for this Facility on or about August 2 of this year; that the contract with Mr. Tomsone between the Government and Mr. Tomsone was then in effect; that Mr. Tomsone, after a few weeks or sometime in September, was [5] approached by Dr. Gage and was told, in substance, that if he wished to carry on, that if he wished to profit by his contract, that he would have to make it right by Dr. Gage.

We believe the evidence will establish that over a period of time there were some negotiations along that line, and Mr. Tomsone didn't exactly go for that; that Mr. Tomsone reported that matter to the proper authorities, and that on October 15, 1946, Mr. Tomsone did pay to Dr. Gage a hundred dollars, after they had reached an agreement that he was to pay a hundred dollars a week if he was going to continue to get business, or if things were to be profitable to him with respect to his contract there at the Veterans Facilities.

I believe that the evidence will establish that the Federal Bureau of Investigation, through its agents, were advised of this incident, and Mr. Tomsone had the money, it was checked, it was handed to Dr. Gage, Dr. Gage accepted the money and within a very short period after that was taken under arrest and the money was found in his pocket.

In other words, the Government believes that it will establish beyond a reasonable doubt both the asking of and the actual receipt of the money in conjunction with the allegations as charged in this indictment.

The Court: Mr. Sullivan, do you desire to make an opening statement now or do you wish to reserve it?

Mr. Sullivan: I desire at this time to reserve my right [6] to make one.

The Court: Very well.

Call your witness.

Mr. Neukom: Call Mr. Mark.

ALVIN O. MARK,

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Alvin O. Mark; M-a-r-k.

The Clerk: Your address?

The Witness: 832 South Taylor; Montebello.

The Clerk: Take the stand.

Direct Examination

By Mr. Neukom:

Q. Mr. Mark, by whom are you employed?

A. The Los Angeles Regional Office of the Veterans Administration.

Q. Is that not located at what we commonly refer to as Sawtelle? A. Yes, sir.

Q. You have been employed there for some time?

A. Since June of this year.

Q. In what capacity?

A. As the personnel officer.

Q. You were subpoenaed to produce the personal jacket [7] of the defendant Dr. Gage? A. Yes.

(Testimony of Alvin O. Mark)

Q. Have you produced the order appointing Dr. Gage as a doctor or an employee for the Facility?

A. Yes, sir.

(Exhibiting documents to counsel.)

By Mr. Neukom:

Q. While they are examining that, may I inquire, are you acquainted with the defendant? A. Yes, sir.

Q. You knew, or did you observe, that he was working at the Facility here a few months back?

A. Yes, sir.

Q. To your best recollection, did he commence work around about August 2nd of this year?

A. On August 2nd.

Q. And continued to work until?

A. He was suspended on October 18.

Q. Of this year? A. Yes, sir.

The Court: What type of work was he doing?

The Witness: He was employed as an orthopedic surgeon.

By Mr. Neukom:

Q. I show you what appears to be an oath of office. Is this the document whereby Theodore S. Gage was placed to [8] work by the Veterans Administration?

A. Both documents, the oath of office and the personnel action.

Q. And the personnel action, as reflected from this carbon copy, is that correct? A. Yes, sir.

Mr. Neukom: May that be marked as one document, your Honor, the pink sheet and the oath of office?

The Court: Yes. No. 1 in evidence.

(Testimony of Alvin O. Mark)

(The documents referred to were received in evidence and marked Government's Exhibit No. 1.)

By Mr. Neukom:

Q. Has the defendant been paid as a paid employee?

A. Yes, sir.

Mr. Neukom: That is all.

The Court: Cross examine.

Mr. Sullivan: I have no questions.

The Court: You may be excused.

(Witness excused.)

Mr. Neukom: Call Mr. Howe, please.

GORDON L. HOWE,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir.

The Witness: Gordon L. Howe; H-o-w-e. [9]

The Clerk: Your address?

The Witness: Quarters 290 at Sawtelle.

The Clerk: Take the stand.

Direct Examination

By Mr. Neukom:

Q. Mr. Howe, what is your business or occupation?

A. I am supply officer with the Regional Office of the Veterans Administration here in Los Angeles.

Q. And is that the same location where Dr. Gage was employed as a medical man from about August the 2nd of this year until around about October 18?

A. Yes, sir. And as you say, known as Sawtelle.

(Testimony of Gordon L. Howe)

Q. You are acquainted with the defendant here?

A. Yes, sir.

Q. Were you aware that he was performing services at the hospital where you were also employed?

A. Yes, sir.

Q. Were you personally aware, I mean?

A. Yes, sir.

Q. You were subpoenaed to produce a contract between the Facility, that is to say, the Government, the Veterans Administration, and Hubert's Orthopedic Service, were you not?

A. Yes, sir.

Q. I showed you what purported to be a copy, or a duplicate copy, of an application for a bid awhile ago, did I not?

A. Yes, sir. [10]

Q. And did you have occasion to compare that with the duplicate copy that is in the files that you have with you and which I understand are under your direction and supervision, are they not?

A. Yes, sir.

Q. To see whether or not the copy that I showed you was a duplicate copy of the one that reposes in the Veterans Administration files?

A. That is right.

Q. You made such a comparison?

A. Yes, I did.

Q. And you have before you the Government's copy?

A. Yes, I have the Government's copy, and they are substantially the same.

The Court: Substantially?

The Witness: Well, yes. The copy in Hubert's file doesn't bear the signature of the contracting official.

The Court: Have you got the original?

(Testimony of Gordon L. Howe)

Mr. Neukom: They are duplicate originals, your Honor. I intend to have one identified and then I am going to offer just that.

The Court: Let him see the original while he is looking at the copy. He may not consider the difference significant enough to mention. [11]

By Mr. Neukom:

Q. I show you a folder. Is this the folder of the files of the Veterans Administration under your control and custody? A. It is.

Q. And the document which is dated June 21, 1946, does that pertain to a contract awarded to the Hubert's Orthopedic service? A. It does.

Q. And is the signature down there of the contracting officer, G. L. Howe, is that your signature as the supply officer? A. Yes, sir.

Q. And was it your position and duty to handle the award of contracts as of that period? A. It was.

Q. And you have been in that capacity for about how long? A. Approximately eight months.

Q. I show you the document that appears under this. The remaining sheets, which comprise about 11 sheets, appear to be on mimeographed paper and they have at the top of them: "U. S. Standard Form 33 (revised)." To your knowledge were those invitations for bids, forms, that the Government put to people who might wish to submit a contract? A. That is right. [12]

(Testimony of Gordon L. Howe)

Q. And looking at the document, the 22 pages and the front page, will you relate to us in your specialized field there just to what date that contract was issued?

A. The invitation to bid was forwarded to interested parties June 5, 1946, bids were opened on June 21, 1946, and the contract awarded that same date?

Q. What date? A. On June 21, 1946.

Q. And the bid seems to bear the signature of one Hubert Tomsone. Are you acquainted with that man?

A. Yes, I am.

Q. Are you also acquainted with the Hubert's Orthopedic Service? A. As a contracting firm only.

Q. Of what character of work, if any, have they ever done for the Veterans Facility?

A. They performed work under this contract, and a previous contract also, furnishing specialized shoes in a specialized field, orthopedic braces, various types for the feet.

Q. For more than one hospital?

A. Yes, for more than one activity.

Q. But it was for more than just the Sawtelle unit then? A. That is right.

Q. And the others are specified in the contract, is [13] that correct? A. Yes, they are.

Q. This contract was to elapse as of what date?

A. June 30, 1947.

Q. Was the contract in force and affect during the month of October of this year? A. It was.

Q. Is it still in force and effect? A. It is.

Q. Has it ever been canceled? A. No, sir.

(Testimony of Gordon L. Howe)

Q. I show you a letter dated June 22, 1946, which bears the signature of one G. L. Howe. Is that your signature? A. Yes, sir.

Q. G. L. Howe, Regional Supply Officer?

A. Yes, sir.

Q. It refers to a contract number and is directed to Hubert's Orthopedic Service. Will you relate the circumstances or why you happened to write that letter?

A. Following the receipt of bids and the award of the contract, it is prescribed procedure to advise the successful bidder that he has been awarded the contract, and we do that in a form letter such as we mailed to Hubert's Orthopedic Service. [14]

Q. Now you are referring to the letter of June, 1946?

A. Yes, sir.

Mr. Neukom: Which I am now going to ask to be received into evidence as Government's exhibit next in order.

Mr. Sullivan: We have no objection to the letter.

The Court: Admitted.

The Clerk: Government's Exhibit No. 2.

(The document referred to was received in evidence and marked Government's Exhibit No. 2.)

Q. By Mr. Neukom: I note on the top of this file here that there appears to be a copy of Government's Exhibit No. 2. Is that the carbon copy of the letter for your file? A. Yes, it is our routine copy.

Q. I show you what appears to be a carbon copy of a letter dated June 19, 1946, on the letterhead of Hubert's Orthopedic Service. Is that letter a part of the file pertaining to this contract? A. It is.

(Testimony of Gordon L. Howe)

Q. And has been reposing in the file since shortly after the date of the letter?

A. Yes, since the award of the contract on June 21st.

Mr. Neukom: I am now going to offer this particular file, your Honor, with the contract, carbon copy of the letter, and other letter without any detaching, unless there is some objection. [15]

Mr. Sullivan: No objection.

The Court: Admitted. No. 3 in evidence.

(The file referred to was received in evidence and marked Government's Exhibit No. 3.)

By Mr. Neukom:

Q. Has Mr. Tomsone, or Hubert's Orthopedic Service, to your knowledge been paid for shoes or other devices that they have supplied to veterans who were outpatients and been paid by the Government pursuant to this contract? A. Yes, in the routine manner they have.

Q. Prior to this contract, do you know in connection with your work as a supply officer that Mr. Tomsone's concern was engaged and was being paid for devices and shoes and matters such as that? A. Yes, sir.

Q. Was that true during the month of October, 1946?

A. That is right.

Q. And is it still true? A. It is still true.

Mr. Neukom: That is all.

The Court: Cross examine.

(Testimony of Gordon L. Howe)

Cross Examination

By Mr. Sullivan:

Q. Mr. Howe, how long have you been employed as the supply officer at the Regional Office of the Veterans Adminis- [16] tration at Sawtelle?

A. I can't recall the exact date, but it was approximately September of last year, 1945.

Q. September of 1945?

A. When I was appointed; yes, sir.

Q. At the time you went to work there in September of 1945 there was already in existence a contract for the furnishing of orthopedic shoes and corrective shoes between the Veterans Administration and some person, was there not? A. Yes, sir.

Q. And the contract which was in existence at the time you went to work there expired sometime during the month of June of 1946? A. Yes, sir.

Q. And was it your duty as supply officer to forward to interested persons invitations to bid on a new contract for furnishing orthopedic shoes or corrective shoes to the Veterans Administration? A. It was.

Q. And as I understand your testimony on direct examination, there were invitations forwarded on June 5th to interested persons to furnish bids to the Veterans Administration for orthopedic shoes or corrective shoes for disabled veterans, is that correct?

A. That is right. [17]

Q. And were those invitations that were forwarded on June 5, 1946 forwarded under your supervision and direction? A. They were.

(Testimony of Gordon L. Howe)

Q. And were there any invitations forwarded to any persons other than to Mr. Hubert Tomsone?

A. There were.

Q. Do you know what other persons, to what other persons you did forward invitations to submit bids?

A. No, I couldn't recall them from memory.

Q. You have no independent recollection, as you sit on the witness stand here today, of the name or the names of any other persons to whom you forwarded invitations to submit bids?

A. No, sir.

Q. Now after this contract was executed between the Administration and Mr. Hubert Tomsone, as I understand your testimony, the contract went into effect on the 22nd day of June, 1946?

A. No, it was effective the first day of July, 1946.

Q. Effective the first day of July 1946 and ran until the 30th day of June 1947?

A. Yes, sir.

Q. In other words, it was a contract between the Veterans Administration and Mr. Hubert Tomsone to furnish to the Veterans Administration at Sawtelle and certain other hos- [18] pitals, Government Veterans hospitals, corrective shoes or orthopedic shoes for the period commencing with the first day of July 1946 and ending with the 30th day of June 1947, is that correct?

A. That is correct.

Q. And under this contract between the Veterans Administration and Mr. Hubert Tomsone, he was the only

(Testimony of Gordon L. Howe)

person who was authorized to furnish orthopedic shoes or corrective footwear to the Veterans Administration at Sawtelle and to the other veterans hospitals mentioned in the contract, is that not correct?

A. No, I wouldn't say that he was the only one, because that is too restrictive.

Q. Let me ask you this: Were there any contracts existing between the Veterans Administration and any other person or shoe manufacturing concern which had for its purpose the furnishing of orthopedic or corrective shoes to the Veterans Administration at Sawtelle for the period from the first day of July 1946 to the 30th day of June 1947 other than the contract that existed between the Veterans Administration and Mr. Hubert Tomsone?

A. There could be, but I have no knowledge of them.

Q. In other words, could there have been in existence such a contract that some other personnel administrator had supervision over that you had no supervision over? [19]

A. No, sir. I am the contracting officer for the Regional Office.

Q. All right. And if any such contract was executed it would have come under your jurisdiction out there, would it not?

A. A local award contract, yes. Our Washington office sometimes negotiates contracts for the entire Veterans Administration, and the various activities can take ad-

(Testimony of Gordon L. Howe)

vantage of those contracts as they see fit, but my memory doesn't permit me to say whether there is one or there isn't one.

Q. You have no independent recollection as you sit on the witness stand here today of any contract executed between the Washington office of the Veterans Administration and some person or shoe manufacturer which had for its object or purpose the furnishing of corrective shoes or orthopedic shoes to outpatients at the veterans' hospital at Sawtelle during the period from July 1, 1946 to June 30, 1947, do you? A. No.

The Court: Pardon me, Mr. Sullivan. How much longer will you be with this witness?

Mr. Sullivan: I might be a few minutes. If your Honor wants to adjourn maybe we had better have the recess.

The Court: We will recess until 10:00 o'clock tomorrow morning. You are admonished not to discuss this case among yourselves or with any other person or to form or express a [20] conclusion until it is finally submitted to you for decision.

Recess until 10:00 o'clock tomorrow morning. All witnesses are directed to return.

(Whereupon, at 4:35 o'clock p.m., a recess was taken until 10:00 o'clock a. m., December 11, 1946.) [21]

* * * * *

Los Angeles, California, December 11, 1946, 10:00 o'clock a. m.

The Court: United States v. Gage.

Mr. Sullivan: Ready.

Mr. Neukom: Ready.

The Court: Is it stipulated that the defendant is present in person and by counsel, and that the jurors are present and each in his or her place?

Mr. Neukom: So stipulated.

Mr. Sullivan: Yes, your Honor.

The Court: Proceed.

GORDON L. HOWE,

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Continued)

By. Mr. Sullivan:

Q. Mr. Howe, I think at the time that we adjourned last night you had testified that you knew or did not know of the existence of any contract between the Veterans Administration made in Washington with any person to furnish orthopedic or corrective shoes to any of the patients at the Facilities at Sawtelle? A. Yes. [25]

Q. And I believe I asked you, and you testified that had such a contract been in existence, that it would have been under your supervision in so far as the Facilities at Sawtelle were concerned?

A. Yes, we would have had a copy of it.

(Testimony of Gordon L. Howe)

The Court: Did you over the recess look and see in the records if there was such a contract during that period?

The Witness: Yes.

The Court: Was there?

The Witness: I did not find any.

The Court: From the fact that you didn't find any in the usual course of business as it is run out there, you would say that this was the exclusive contract for the furnishing of shoes?

The Witness: Yes, sir.

The Court: Or whatever it furnishes?

The Witness: Yes.

By Mr. Sullivan:

Q. Now was there any procedure in effect at the Veterans Administration at Sawtelle for the furnishing of shoes, orthopedic or corrective shoes, to veterans from any person other than Hubert Tomsone?

A. I don't know of any.

Q. Isn't it true that from time to time you had various complaints from veterans that Mr. Tomsone could not make [26] their shoes, or made them incorrectly and that it was necessary to furnish a special order to have shoes made elsewhere?

A. No, I don't know of any. Let me change that. There could have been purchases made elsewhere outside of the contract.

Q. On an order from the Veterans Administration at Sawtelle?

A. Yes, the medical section.

Q. Did you have anything to do with the furnishing of any such orders?

A. No, sir.

(Testimony of Gordon L. Howe)

Q. You testified that you knew that Dr. Gage was employed at the Veterans Administration at Sawtelle?

A. Yes.

Q. And you did from time to time have occasion to discuss with him the matter of the shoes that were being made by Hubert Tomsone under his contract with the Veterans Administration?

A. Yes, sir.

Q. As a matter of fact, Dr. Gage had from time to time complained to you about the manner in which Mr. Tomsone was fulfilling his contract, didn't he?

Mr. Neukom: Just a moment, your Honor. I object to an extensive going into anything pertaining to this contract as being a collateral issue in this case. We are not trying the [27] contract. We are not here to determine whether or not this man was giving the best of service. There has been testified that there was a contract. It is in existence. It carries certain clauses in it. As to the other phases on that aspect of the case, they do not clarify any of the issues in this case.

The Court: Objection overruled. The introduction of the contract opens the door for cross examination concerning the practices under it and the things to which it relates.

Mr. Neukom: Very well.

Mr. Sullivan: Will you read the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

("Q. As a matter of fact, Dr. Gage had from time to time complained to you about the manner in which Mr. Tomsone was fulfilling his contract, didn't he?")

(Testimony of Gordon L. Howe)

The Witness: Yes. On two occasions I had telephone conversations with Dr. Gage about the services furnished under the contract.

By Mr. Sullivan:

Q. As a matter of fact, Dr. Gage told you on one of those telephone conversations that he had with you that the contract was not proper orthopedic contract, isn't that right? A. That is right. [28]

Q. And he suggested that it should be rewritten, and you suggested to him that since he was an othopedic man that he should rewrite the contract the way it should be written, in so far as orthopedic or corrective shoes were concerned? A. That is right.

Q. And he also called your attention to the fact that Mr. Tomsone was not making his shoes according to the specifications contained in the contract, didn't he?

A. I don't know just how to say it, but at times the contract didn't cover all the corrections that were required in the shoes that were made, and in those instances the corrective work was made on the nearest applicable clause or specification in the contract.

Q. Well, he called your attention to instances where an order had been given to a veteran to have a certain lift put in the shoe and that Tomsone was charging for an extension to the shoe, did he not? A. That is right.

Q. And he told you that when Tomsone was charging for an extension to the shoe he was charging the Government the sum of \$5 for the extension when a lift should only cost about a dollar or \$1.50, isn't that right?

A. Yes, that is about right.

(Testimony of Gordon L. Howe)

Q. Did you yourself ever receive any complaints from any veterans in so far as Tomsone's shoes were concerned? [29] A. No, sir.

Q. Any complaints that came to you about it would come from the doctors in the orthopedic department?

A. Yes.

Q. Is that right? A. Yes.

Q. Do you recall ever having issued a special order to a veteran by the name of Curry to have orthopedic shoes made by some person other than Tomsone?

A. No, I don't.

Q. Do you recall ever having issued a special order for orthopedic shoes to be made for a veteran by the name of Kandlish to some person other than Tomsone?

A. No, I don't.

Q. Now Dr. Gage did inquire from you from time to time as to whether or not he had a right to issue an order to a veteran to have shoes made by some person other than Hubert Tomsone, did he not?

A. I don't remember.

Q. You do remember having had some discussion with Dr. Gage in relation to the execution of this contract with Tomsone? A. Yes.

Q. And you told Dr. Gage that Mr. Tomsone was the only person who submitted any bid? [30]

A. For a complete service under the intended contract.

Q. Did you have other bids submitted?

A. One other bid.

Q. Who was that from?

A. I don't recall the name of the concern.

Q. You haven't made any effort to check your records since yesterday to ascertain that, have you?

(Testimony of Gordon L. Howe)

Mr. Neukom: He has it there.

The Witness: I have it here.

Mr. Neukom: Check it now.

The Witness: (Examining file) To the Hollywood Orthopedic laboratory.

The Court: By the way, counsel asked you a moment ago if you remembered giving a special order for shoes to two parties. Would that be in there?

A. No, that wouldn't be in the file.

By Mr. Sullivan:

Q. Do your records there disclose the names of the persons who were invited to submit bids on the contract which is now in effect? A. Yes.

Q. What does your record show as to the names of persons who were invited to submit bids?

A. The Hillcrest Orthopedic Appliance Company, which is in San Diego, Krueger Surgical Company in Los Angeles, [31] Green Orthopedic Appliance Company, Los Angeles, George R. E. Milligan Company, Los Angeles, Hubert's Orthopedic Service, Los Angeles, Michael's Foot Comfort Shop, Santa Monica, Hollywood Orthopedic Laboratory.

The Court: And you had only two bids?

The Witness: Two bids.

By Mr. Sullivan:

Q. Are you acquainted with a shoe manufacturer, orthopedic shoe manufacturer, by the name of Sears?

A. I know of him.

Q. Do you recall having had some conversation with Mrs. Sears about this contract? A. Yes.

(Testimony of Gordon L. Howe)

Q. Do you recall that she made some inquiry as to why they had received no invitation to bid?

A. That is right.

Q. Do your records at the Administration in Sawtelle disclose that at some time in the past Sears did have the contract for the making of orthopedic corrective shoes?

A. The records in our office are relatively new, that is, within the last year, since the date of the organization of the office, so our records do not go back beyond about September of last year.

Q. Then you had no record, as far as you were concerned, about Sears ever having had a contract? [32]

A. No, sir.

Q. These other people that invitations were submitted to bid, do your records disclose that they at some time in the past had had some contracts?

A. I might explain, at the time we prepared this invitation we contacted the supply office at the hospital which had heretofore handled these contracts for the list of names which they ordinarily used in submitting bids, and this list of names was what we secured from them.

Mr. Neukom: Possibly it might be informative, your Honor, for him to explain that there is a divergency between one phase of this Facility and this new outpatient Facility, of which he is now the regional supply officer, if counsel would like to have it explained.

I understand there are units out there, many units, and that this is a new unit that has been set out as distinguished from the old hospital itself which has been there for years, which formerly used to handle that.

Mr. Sullivan: We might have that explanation so that we will understand the procedure out there.

(Testimony of Gordon L. Howe)

The Court: Go ahead.

The Witness: The Regional Office, which now controls this contract, prior to about the middle of last year was a part of the home and hospital activities at Sawtelle, an integral part. Then the work of the Regional Office's activi- [33] ties expanded to such an extent that it was necessary to break away from the hospital and set the regional office up as an independent activity.

The Court: For outpatients?

The Witness: For outpatient service; yes.

The Court: And that is what your office is?

The Witness: Yes, sir. In connection with only the veterans outside of the hospital.

The Court: So that while you are part of the Veterans Administration there you have nothing to do with the hospital or the patients in it, only outpatients?

The Witness: That is right, just outpatient service. And when our office organized, we started in with just a bare office and we had to build our records up as we went along, and had to rely on information we could get from the office at the hospital, so that even now we go back to them in many instances to get information about certain activities that we have no record of, and this was just the customary procedure where we had no knowledge of what firms might be interested in bidding, we just asked them for their mailing list and used that in the preparation of our bids.

Mr. Sullivan: I think that is all I have of this witness, your Honor.

The Court: Redirect?

Mr. Neukom: Yes, your Honor. [34]

(Testimony of Gordon L. Howe)

I probably will refer to this in time. I am going to give you the one that is in evidence because I have a copy of it.

(Exhibiting document to counsel.)

Redirect Examination

By Mr. Neukom:

Q. Mr. Howe, did you have knowledge from the main hospital activity that Mr. Tomsone had had a previous contract with the hospital? A. Yes.

Q. Did you have any knowledge that any such contracts had ever been canceled?

A. Not to my knowledge.

Q. As to any complaints that had been made about any particular shoes that Mr. Tomsone's firm had made, had Mr. Tomsone shown a willingness to rectify any such errors or mistakes or lacking in workmanship?

A. As far as I know, he was given an opportunity to make any corrections necessary, and as far as our office records are concerned, why the corrections were satisfactorily made.

The Court: What do you mean by corrections, repayment of overcharges?

The Witness: No. I might explain, sir. It is a customary procedure in contracts such as this, where the appliance [35] has to be fitted to the individual's measurements, that adjustments have to be made after it is manufactured, and sometimes an appliance will be furnished and it doesn't fit at all, so it is referred back to the contractor.

(Testimony of Gordon L. Howe)

The Court: I understand. In other words, you mean the mechanical correction of the contrivance?

The Witness: That is right.

By Mr. Neukom:

Q. Now with regard to this contract, did you also cause to be posted prior to the acceptance of Mr. Tomisone's bid notices that the Government was inviting bids at any post offices?

A. Yes. We sent the bids to three different post offices.

Q. What are they?

A. To the main office in Los Angeles, to the Santa Monica post office and the Beverly Hills post office.

Q. Prior to the acceptance of this contract with Mr. Tomisone, did you personally have any personal contact with him other than in business? A. None at all.

Q. Did you have any social contact with him?

A. No, I didn't.

Q. Did you have any discussions with him?

A. No. I just knew that Mr. Tomisone had this contract. [36] I knew him by sight. That is about the extent of our relationship.

Q. Now did you yourself, were you the final person in deciding whether or not this contract should be let to Mr. Tomisone?

A. There is a rather involved procedure there. At the time the bids are opened the bids are recorded and then a committee of three pass on the award of the contract according to the conditions and specifications and clauses. Then following this indication of award by the committee the entire bid folder containing all the bids goes to the finance office of the Regional Office and there it is

(Testimony of Gordon L. Howe)

audited again by representatives under the direction of the finance officer, and if everything is in order it is returned to the supply office for proper distribution.

Q. Then is it passed upon by a board of three?

A. No, the board passes before it goes to the finance office for audit.

Q. But it is not left to your final decision?

A. No.

Q. Were the forms that were submitted and which were from your files, Government's Exhibit No. 3, were the forms that comprise this file standard forms that were sent to your offices from your Washington office?

A. Yes. This is the prescribed form of invitation of [37] this sort.

Q. I observe that it appears to be mimeographed, is that correct?

A. That is the usual procedure.

Q. And this is made available to anyone who wishes to bid upon the contract?

A. That is right.

Q. With all of its pages they fill in what portions of it they care to bid upon, is that correct?

A. That is correct.

Mr. Neukom: I would like to read from portions of this contract.

Reading from page 2 of Government's Exhibit 3—and I have a copy of it so counsel may follow along with me—at the top of page 2 appears:

"The right is reserved to the contracting officer to declare the contractor in default if, in the opinion of the contracting officer, there has been at any time a failure to perform faithfully any of the contract stipulations, or in case of willful attempt to impose upon the Government

(Testimony of Gordon L. Howe)

articles and/or services inferior to those required by the contract, and any action taken by the contracting officer, in pursuance of this stipulation, shall not affect or impair any right [38] or claim of the United States to damages for breach of any of the covenants of the contract by the contractor. It is understood and agreed that when a contractor has been declared in default by the contracting officer thereafter during the remainder of the contract period the Veterans Administration may purchase the articles and/or services covered by the contract of the defaulting contractor without furnishing said defaulting contractor orders thereafter, and that any excess in cost over the original contract price shall be charged to said defaulting contractor and his sureties, if any."

Q. If I may inquire, was a bond posted for faithful performance of this contract?

A. I am not sure. I don't believe a bond was required in this instance. It would show in the contract.

Mr. Neukom: I will have to leave that for another witness then if you are not acquainted with that phase of it.

Reading from the same page:

"SPECIAL CONDITIONS

"1. Prices quoted in this proposal will not be in excess of those charged the general public.

"2. Bidder certifies that the prices quoted in this bid are not in excess of any applicable price ceiling established by the Office of Price Administration.

"3. Notice to bidders: Prices bid should include [39] any applicable Federal Excise Taxes, as the United States is not exempt from payment of such taxes.

(Testimony of Gordon L. Howe)

"4. This proposal, if accepted, shall become a contract and shall remain in force during the period above stated unless terminated at the request of either party after thirty (30) days notice in writing.

"5. In the event the Veterans Administration closing either of the Activities concerned, subsequent to the execution of the contract or during the contractual period the contract in so far as that activity is concerned, may be canceled immediately upon written notice to the contractor and the Veterans Administration relieved of its obligation to make further purchases of supplies and/or services thereunder.

"6. If within sixty (60) days after delivery, an article furnished under this proposal is found to be unsatisfactory due to imperfect fit or faulty construction, upon being returned to the contractor, it will be corrected, and adjusted or replaced if necessary, to give satisfactory results.

"7. The facility reserves the right to reject all items which are faulty in construction, or in which the materials are of unsatisfactory quality.

"8. No item will be approved for payment until it has been inspected by an authorized representative of the facility. Acceptance will be governed by the quality of materials, character of workmanship and accuracy of fittings. Before final rejection is made, reasonable opportunity will be given contractor to make the required corrections of faults and adjustments."

The remainder of it is with regard to specifications and with regard to individual items as to what the price will be for the service, and to read it to you, you would not

(Testimony of Gordon L. Howe)

remember it and I would prefer to later have it passed around to [40] you.

That is all from this witness.

The Court: Recross?

Recross Examination

By Mr. Sullivan:

Q. You recall, do you not, that in one of the conversations you had with Dr. Gage that he told you that Mr. Tomsone was using an inferior grade of leather in the shoes which he was making which was in violation of the terms of this contract, did you not?

A. I don't remember that point.

The Court: Would you say that you never had the conversation or you just don't recall it?

The Witness: I don't recall it, sir.

By Mr. Sullivan:

Q. Do you have any record under your control or supervision that would indicate the approximate number of shoes that were ordered of Mr. Tomsone per month under this contract which is now in existence with Mr. Tomsone? A. Yes. Our files would show that.

Q. Do you recall the approximate number of shoes? This contract went into effect July 1, 1946.

A. Yes.

Q. And between the months of July, that is, from July 1st, in September 1st, July and August of 1946, do you recall [41] approximately how many shoes were ordered under this contract?

A. No, I wouldn't remember that.

Q. You couldn't even tell us approximately?

A. No, I wouldn't even hazard a guess.

(Testimony of Gordon L. Howe)

Q. Do you know approximately how many shoes were ordered under this contract per month during the months of September and October of 1946?

A. No, I don't.

Mr. Sullivan: I think that is all, your Honor.

Redirect Examination

By Mr. Neukom:

Q. Mr. Howe, if the defense would like it you would be willing to try to furnish that information, would you not?

A. Yes, we can get that out of our files.

Mr. Neukom: I happen to have it. It will come from another witness in summation form.

Mr. Sullivan: That may be satisfactory.

Mr. Neukom: I might show this to you sometime and maybe you will be willing to consider this that I have here.

Mr. Sullivan: All right, Mr. Neukom:

By Mr. Neukom:

Q. But, Mr. Howe, will you try to secure that information and if it becomes material we will call you?

A. That is separating July and August and then September and October? [42]

Mr. Sullivan: Yes.

The Witness: Yes, we will prepare that for you.

The Court: Total appliances or articles furnished?

The Witness: Yes.

The Court: Or just shoes?

The Witness: Should I go on and give a total recapitulation of the items and money?

Mr. Sullivan: I think we are primarily interested in the shoes.

(Testimony of Gordon L. Howe)

Mr. Neukom: May I have a moment with counsel?

(Conference between counsel.)

Mr. Neukom: Break it down as to the regional office and as to the center, the total amount of material that Mr. Tomsone furnished both to the regional office and the center, break those items down and then give the totals for July, August, September and October.

The Court: Otherwise the witness may be excused and may return on telephone call if it is necessary?

Mr. Neukom: Yes.

(Witness excused.)

The Court: Next witness.

Mr. Neukom: Dr. Long.

DR. FRANK L. LONG,

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as [43] follows:

The Clerk: Your name, sir?

The Witness: Frank L. Long.

The Clerk: Your address, Dr. Long?

The Witness: Veterans Administration, Sawtelle.

Direct Examination

By Mr. Neukom:

Q. Dr. Long, what is your occupation?

A. I am a physician.

Q. Licensed to practice here in the state of California?

A. I am.

(Testimony of Dr. Frank L. Long)

Q. You are connected with what organization?

A. With the Veterans Administration.

Q. And have been so connected for how long, approximately?

A. Twenty-seven years next month.

Q. And at the present time what is your title or duty?

A. I am Chief Medical Officer of the Medical Department and Chief of the Outpatient Department at the Sawtelle Hospital.

Q. That is the same unit or breakdown of which Mr. Howe is the regional supply officer?

A. Yes.

Q. Prior to that were you affiliated and connected with the hospital or Veterans Administration Hospital at Sawtelle? [44]

A. With the outpatient department.

Q. And have been for a number of years?

A. I have been in this office all the time I have been with the Veterans Administration. It will be 27 years next month.

Q. Are you acquainted with the defendant Dr. Gage?

A. I am.

Q. When did you first meet him?

A. When he reported for duty on August 2nd of 1946 was the first time I ever saw him.

Q. Did he work under your direction?

A. He did.

Q. And as working under your direction, what phase of duties did he have?

A. He had to do with the examination and treatment of eligible veterans with orthopedic disabilities and supplying and determining the need of shoes or modified shoes and also of artificial limbs.

(Testimony of Dr. Frank L. Long)

Q. Was it a part of his duties to recommend to superiors or to other phases of the hospital as to whether or not shoes or orthopedic devices should or shouldn't be accorded deserving veterans?

A. He had the responsibility of determining under the regulations whether the veteran was entitled or needed—not entitled but what kind of an appliance he needed. Whether he [45] was entitled to treatment was determined by somebody else, his eligibility, I mean.

Q. Let us assume a man was a veteran who was eligible and needed some correction to his foot that might be aided by some corrective shoe. Was it a part of Dr. Gage's duties to examine such a patient's or veteran's feet?

A. It was.

Q. And then was it a part of his duties to recommend whether or not the Government or the Veterans Administration should purchase shoes or devices for that patient?

A. Yes. He would recommend what was needed under the contract and write his order in the treatment folder, and that was taken to the orthopedic clerk and she would write up the purchase order and send it to the supply department to be obtained.

Q. Was his judgment during the period that he was working there, was he given more or less free reign to recommend? A. He was responsible for that.

Q. And if he would recommend shoes in the normal course of events, would shoes be bought by the Government, orthopedic shoes? A. Yes.

Q. And paid for? A. Yes. [46]

Q. And if he would state that shoes were not justified or were not needed, they would not be provided, is that correct? A. That is right.

(Testimony of Dr. Frank L. Long)

Q. Did he have other doctors working in conjunction with him?

A. Yes, there was another doctor, a Dr. Nie, who was not an orthopedic surgeon but who knew the regulations as to entitlements and can write repeat orders and such as that.

Then he asked to have some assistance soon after he came there, and I assigned Lt. Strachan to him, a young doctor, for his help. He said that he needed somebody else, so there were two other doctors helping him.

Q. Was he so engaged up to the 18th of October of this year? A. Yes.

Q. And his work was somewhat of the character that you have generally described during the interval from August 2 to about October 18?

A. Yes, that was his responsibility.

Q. Dr. Long, are you acquainted with Mr. Tomsone?

A. Yes.

Q. Since you have been with the Facilities for over 26 years, did you know whether or not Mr. Tomsone has had contracts with the Veterans Administration to provide orthopedic [47] devices and particular shoe devices?

A. He has. Up until two and a half years ago I had no administration authority at all. At that time I was appointed the Assistant Chief of the Outpatient Service. Prior to that time I don't know the exact arrangement that they had, but I remember seeing him around there for several years and knew that he was in the orthopedic business.

Q. Doctor, during the time that you have been in charge of this regional office of the outpatient department,

(Testimony of Dr. Frank L. Long)

has Mr. Tomsone, with the exception of minor misadjustments, has his devices to your knowledge appeared to be satisfactory?

A. Generally so. We have had some complaints and some that he had to make over, and there have been in times past, especially during the war when things were hard to get, there were more complaints than there have been of late.

Q. Did he show a willingness to cooperate?

A. To my knowledge he always tried to make it good and if he couldn't then he would have to do something else about it.

Q. That is to say, there might be extreme cases where his offices or his shop was not capable of furnishing?

A. The individual sometimes enters into it. It is pretty hard to fit or satisfy everybody. Once in a while it is almost impossible. A fellow gets an idea, maybe it is not an idea, that he can't fit it, and we have bought three pair [48] of shoes to try to fit the veteran's needs, and when a veteran needs a shoe we have to try to get it some place.

Q. Do you have, Doctor, some figures as to the amount of devices of anything that Mr. Tomsone has done?

A. I asked my orthopedic clerk to give me the numbers, and I have them on a memorandum in my pocket.

Mr. Sullivan: I have no objection to him referring to them.

Mr. Neukom: Let us both look at them. I have not seen it myself.

(Counsel examining document.)

(Testimony of Dr. Frank L. Long)

The Witness: This is just what the clerk handed me for the four months in the outpatient department for the regional office, and this list is for what was furnished for the domiciliary and hospital people.

Mr. Neukom: May we examine the doctor right here on this, your Honor, so we can both be here?

The Court: Surely.

By Mr. Neukom:

Q. Will you explain what the first page is?

A. This is the number of shoes that were furnished the outpatient department for the months of July, August, September, October and November.

Q. By Mr. Tomsone?

A. That was the orders we issued to him. Some of them [49] may not be completed yet. I don't know about that. But that is that is the number of orders that were issued to him.

Mr. Neukom: May we offer this with the exception that I don't think—I have no objection. The month of November appears here. Do you wish to have it remain on?

Mr. Sullivan: I have no objection to it remaining on there.

Mr. Neukom: May this be offered as Government's exhibit next in order?

The Court: No. 4 in evidence.

(The orders referred to were received in evidence and marked Government's Exhibit No. 4.)

The Court: That is a summary taken by you from the record?

The Witness: That is right, of the orders we issued.

(Testimony of Dr. Frank L. Long)

The Court: For shoes?

The Witness: For shoes and arch supports and repairs under the contract that he had.

The Court: It is indicated "arch supports," "shoes" and modifying shoes is that what you mean by repairs?

The Witness: That is right. Modifying his own shoes to fit the condition.

The Court: All right.

By Mr. Neukom:

Q. I show you the next document which has a heading [50] "purchases made from Hubert's Orthopedic Service beginning July 1, 1946, home and hospital patients." Is that different than Government's Exhibit 4?

A. This is in addition to that because this is the ones at the hospital and home which the regional office does not pay for, but the contract covers the furnishing of these things to the three units, the regional office, the soldier's home or domiciliary department, or the main hospital if they have anybody in there that requires any of these items.

Q. But Uncle Sam pays for it all?

A. That is right.

The Court: They were all purchased under that one contract?

The Witness: That is right.

Mr. Neukom: I will offer this as Government's exhibit next in order.

Mr. Sullivan: We have no objection.

The Court: Exhibit No. 5.

(Testimony of Dr. Frank L. Long)

(The document referred to was received in evidence and marked Government's Exhibit No. 5.)

The Court: You say the "home and hospital" is the Soldier's Home?

The Witness: That is the Soldier's Home, the domiciliary department. You might be eligible for shoes in the home when you might not be eligible on an outpatient basis. In [51] the outpatient department you have to have service-connected disability and meet the requirements for special appliances.

By Mr. Neukom:

Q. Without going into the conversation, Dr. Long, I just want to ask you one question: Did Mr. Tomson sometime, either in the latter part of September or early in October of this year, come to you and discuss with you a matter that he wanted to call to your attention with regard to conversations he had had with Dr. Gage?

A. He did.

Mr. Neukom: That is all.

The Court: Cross examine.

Cross Examination

By Mr. Sullivan:

Q. Dr. Long, as I understand your testimony, you were the Chief Medical Officer connected with the Regional Office at the Veterans Administration in Sawtelle?

A. And Chief of the Outpatient Service pending the complete separation of the two units.

(Testimony of Dr. Frank L. Long)

Q. And as such Chief Medical Officer, you were the superior of Dr. Gage, were you not?

A. That is right.

Q. And as such Chief Medical Officer your duties were not confined entirely to the orthopedic unit at the hospital, were they? [52]

A. That is right. There are many other duties I had besides that.

Q. In other words, you had supervision over all of the various units of the outpatient department, is that right? A. That is right.

Q. And the first time that you ever became acquainted with Dr. Gage was on the 2nd of August 1946?

A. That is right.

Q. And he came there to accept a position as the chief orthopedic surgeon? A. He did not.

Q. Was that merely the position that you assigned him to?

A. He assumed the position as chief. He was not chief of the service. There was no such thing as chief of the orthopedic service. He was a doctor assigned to that work.

Q. He was the doctor assigned as the orthopedic physician? A. That is right.

Q. Is that correct?

A. That is right. But not chief of the unit.

Q. Did you assign him as the orthopedic physician and surgeon?

A. Yes. I told him what his duties would be and where he was to work when he reported. [53]

(Testimony of Dr. Frank L. Long)

Q. When you assigned him to the orthopedic department you had made some inquiry prior to that time to ascertain his qualifications to fill that position?

A. I never heard of him until he showed up there for the duty. The branch office, or somebody else, had processed him and appointed him. I had no knowledge of him coming other than the spring before—I take that back—Dr. Caldwell, my predecessor, had had contact with him and he had his name as wanting a job, but I didn't see him at that time to my knowledge. But he did have his name on the list there as a prospective doctor for the orthopedic service.

Q. As Chief Medical Officer of the Regional Office, was it your duty to assign the various doctors who were employed there to the particular duties which they were to perform?

A. That is right.

Q. And in making an assignment of the doctors to the various units or duties which they were to perform, did you make any inquiry to determine if they had any special qualifications?

A. He was assigned there as the orthopedic doctor. I had nothing further to do with it as to his qualifications.

Q. Was he assigned as the orthopedic doctor by you?

A. Yes, when he reported there I told him where he was to work and what he was to do.

The Court: Who decided whether or not he was going to [54] do orthopedic work?

The Witness: I did.

The Court: He was assigned there then just as a doctor?

(Testimony of Dr. Frank L. Long)

The Witness: He was assigned as a doctor, as an orthopedist, but we wanted to use him there. But if I had wanted to use him somewhere else I could have used him. If I had not been satisfied with his work I could have transferred him. But he did come there as the orthopedic doctor.

The Court: Who decided that, that he was going to go there as the orthopedic doctor? Was it whoever hired him or did you?

The Witness: He was assigned there as the orthopedist.

The Court: I still don't know who made that decision that he was to be there as an orthopedist. You asked for an orthopedist, did you?

The Witness: That is right.

The Court: And they sent you him?

The Witness: That is right. He was assigned there.

The Court: By somebody else?

The Witness: By the branch office in San Francisco, the personnel department.

The Court: All right.

By Mr. Sullivan:

Q. When he came there then, if you had wanted to assign him some place else you could have done so? [55]

A. I could have done; yes.

Q. Before making the assignment to the orthopedic department, did you make any inquiry as to his qualifications?

A. No. I made no inquiries because we had a vacancy in the orthopedic service, we needed a doctor to look after

(Testimony of Dr. Frank L. Long)

that work, he was assigned there as an orthopedist, with orthopedic qualifications, and he was assigned to that work.

Q. Then you did have some information that was furnished to you before that time that he was an orthopedic doctor, is that right?

A. Yes. He was considered as such when he arrived there.

Q. And you got that information from the records which were furnished you, is that not right?

A. Yes, and what he said that he was, an orthopedic surgeon.

Q. Then you had some discussion with him about his qualifications?

A. Not qualifications. He was assigned there as a doctor and we were to use him, and there was a vacancy in the orthopedic service, and that is where we wanted to use him.

Q. Don't you make any inquiry of these doctors when they come there to work to ascertain if they specialize in one particular branch of medicine and surgery or another?

A. I would if I interviewed him, but I never interviewed him. Frequently a doctor applies for a position out there and I talk to him to find out what his qualifications are and what he has been doing or wants to do and recommend to the personnel department that they employ him. But I never discussed with Dr. Gage his qualifications prior to him coming there.

Q. I understand that you didn't, but I say, when the doctor comes, any doctor comes, to work in the outpatient department there, of which you are the chief medical officer, as I understand your testimony you can assign that

(Testimony of Dr. Frank L. Long)

doctor any place you want, or to any particular kind of work you want to assign him to? A. I could.

Q. What I am trying to ascertain is this, that when you make the assignment of a doctor to some particular type of work, medicine or surgery, do you yourself make any inquiry to ascertain where he is best fitted to serve the veteran?

A. I understood that he was an orthopedic surgeon and he was being sent down there as the orthopedist. We had a vacancy there and he was assigned to that job.

Mr. Sullivan: I move to strike the answer as not responsive.

Mr. Neukom: I think the answer is.

The Witness: He told me he was an orthopedic surgeon and I assigned him to that job. [57]

The Court: It is and it is not responsive. We will strike it. I can see what counsel is trying to get at. I think maybe you do too, Doctor.

The Witness: I am not trying to evade it.

The Court: The long and short of it is that he was hired by somebody else and sent to you and they said, "Here he is," is that right?

The Witness: That is right.

The Court: "Here is your orthopedist"?

The Witness: That is right. We needed one and we put him in that department.

The Court: You said, "Are you Dr. Gage, the orthopedist?" and that was all there was to it? You didn't go down and ask him where he went to school or anything else?

The Witness: No. That was determined by others.

The Court: I see.

(Testimony of Dr. Frank L. Long)

By Mr. Sullivan:

Q. You don't make it a practice of making any inquiry of the individual doctor after he comes there to determine where he is best fitted to serve?

A. I told you a while ago that if he applied there first to me for a position, then I would ask him, but there have been doctors assigned by the branch office personnel department to the division and I have nothing to say, that they can't work there. [58]

Q. But you do have something to say about what particular type of work he does?

A. Yes. If he was just a general practitioner, I wouldn't put him to do mental and nervous disease examinations, or if he is better fitted for some specialty I would like to see that he has that work to do.

Q. That is what I was trying to determine, whether or not you yourself, as the chief medical officer, tried to determine or made any efforts to determine his qualifications by an interview with the doctor himself.

A. No, I knew he was assigned there as an orthopedist, that he had been there and consulted Dr. Caldwell, who was the former chief, in the spring, and we had his name that he was an orthopedist, and then when he reported for duty with the authority from the personnel department it was designated on there that he was an orthopedic surgeon, so I naturally put him in the orthopedic department.

The Court: Had you made a request for an orthopedist?

The Witness: Oh, yes; we had.

(Testimony of Dr. Frank L. Long)

By Mr. Sullivan:

Q. When you say that he was assigned as the orthopedic doctor, was he at that time the only doctor assigned to handle the orthopedic cases there?

A. He was not.

Q. There were other doctors there? [59]

A. That is right.

Q. That were doing that same work?

A. Well, not an orthopedic surgeon. A doctor was filling in and, as I say, he was doing a good many of the things that had to be done in that department. Then when the doctor was there a while he asked to have somebody else assigned to him, and I assigned a young fellow, Lt. Strachan, to help him out for whatever help he needed. He was to use his discretion, whatever he wanted to use him for.

Q. And also Dr. Nie?

A. Dr. Nie has been in the Veterans Administration quite a long time and he had been helping the former orthopedic doctor, especially as to re-ordering and ordering things under the specifications. He was not an orthopedic surgeon.

Q. Well, then, after Dr. Gage came to work there and he was assigned to the orthopedic department, as I understand your testimony it was his duty, when a patient came to the hospital, that is, a veteran came to the hospital for the services of the Veterans Administration, and if he was a veteran who was in need of some orthopedic appliance of some sort or other, he was sent to the department to which Dr. Gage was assigned?

A. That is right.

(Testimony of Dr. Frank L. Long)

Q. And it was Dr. Gage's duty to determine medically [60] whether or not the veteran was in need of some kind of an appliance or not?

A. Yes, he or Dr. Nie, either one could do that.

Q. Either one of them? A. That is right.

Q. In other words, Dr. Nie had just as much right to determine that question as Dr. Gage did?

A. That is right.

Q. And if they determined that the veteran was in need of some kind of an appliance, then the question to determine whether the veteran was eligible to be furnished with that appliance at the expense of the Government was left to someone else?

A. That was determined before he got there. A man's eligibility to benefits is determined before he gets down to this clinic to be furnished. He determines what type of thing he needs if he needs it.

Q. When the veteran reported there for examination, there was a folder that contained a record of his case, is that not right?

A. That is right, an outpatient treatment folder where he wrote his findings and recommendations in.

Q. Yes. And when a veteran called there or came there for an examination, if it was determined that he was in need of some kind of an appliance, there was a record of that put [61] in that particular veteran's folder?

A. That is right.

Q. Is that not correct?

A. Yes. He wrote the order there and signed his name to it and sent it to the clerk to write the purchase order.

(Testimony of Dr. Frank L. Long)

Q. Now in any event, if the doctors in the orthopedic department determined that the veteran was not in need of some kind of an appliance, was there a statement to that effect put in the veteran's folder?

A. If they disagreed—they have a board of two doctors, and if they couldn't agree they were to come to the assistant chief of the outpatient department or me. On one occasion a patient, a veteran who had been authorized to receive treatment by the California Physician's Service, this doctor had received authority to treat him and he had recommended that this man have a brace, back brace, and he came out there to get the measurements, and for some reason or other—I don't know how—he got into Dr. Gage's office. He had no business there for Dr. Gage to pass on. Dr. Gage turned him down. As a matter of policy, this authority had been given to the private doctor who had recommended this, and he came out there for a measurement of the brace, and the question of one doctor saying he didn't need it and the other doctor had approved it, he had been given authority for it, so I said to go ahead and purchase it for him irrespective of [62] what Dr. Gage said because it wasn't his business to determine that at all in that particular case.

Q. You are speaking of that particular case?

A. That is the only one I can remember.

Q. You did say that if they disagreed then it was left to the decision of two doctors?

A. If they couldn't agree, if there was any question that the two doctors should not agree on, then we would have the assistant chief of the outpatient department be the third member.

(Testimony of Dr. Frank L. Long)

Q. In any event, if one doctor examined the patient and determined that he was not in need of some kind of an appliance, was it then the custom to call in another doctor to consult with him?

A. It wouldn't have been unless the man had been receiving something for a period of time and he was going to be cut off from a usual order or treatment. He should have had consultation to do that.

Q. In other words, if it was a veteran who had been furnished in the past with a particular kind of appliance and he came there to have a new one made or some correction made on what he had, if the doctor determined that he didn't need it, then it was the custom to call in another doctor to have the opinion of two rather than one?

A. Yes, provided the thing has been running along for [63] some time.

Q. But if the veteran was new in the outpatient department there and the doctor who examined him determined that he did not need the appliance, then was it under those circumstances the custom to call in another doctor to confirm his opinion?

A. No. Ordinarily we would take his opinion unless the veteran complained that he wasn't satisfied, and then we would have another doctor look at him. We would give the veteran the benefit of the doubt and try to satisfy him if possible.

Q. Now, then, where the doctor did determine that the veteran was not in need of any mechanical appliance of any kind, a report to go with the doctor's opinion and reason therefor was put in the veteran's folder, is that not correct?

A. Should be.

(Testimony of Dr. Frank L. Long)

Q. And of course you as the chief medical officer has supervision over all of the records of the veterans and the outpatient department?

A. That is true, but I wouldn't see all these reports because that was left to these doctors to do unless they got into some disagreement or something why I probably wouldn't see them.

Q. But if there was a complaint from the veteran, then the veteran had a right to come to you, did he not?

A. That is right. [64]

Q. And under those circumstances you would get out the veteran's folder and determine what the doctor's opinion was, is that not right?

A. I would have to finally decide what was to be done about it.

Q. Was it your custom then to call in the doctor who had given this opinion and discuss the matter with him?

A. It would be, but he never came to me at any time about any individual.

The Court: Who?

The Witness: Dr. Gage. He came to me and said that he thought that there should be another contractor so that the man could have a choice of more than one contract. I told him it probably would be better, but we were only given one contract to operate on and that is all we had to do. He never complained to me of any individual.

By Mr. Sullivan:

Q. What I was driving at was this: If the veteran came to you and complained that he was not furnished with an appliance which he felt he was entitled to, you then got the veteran's folder and found that the doctor who had examined him had, in his opinion, determined it

(Testimony of Dr. Frank L. Long)

was unnecessary for him to have such an appliance, and was it then your custom to call in the doctor who had made the examination and discuss that veteran's case with him? [65]

A. If I had any complaint from the patient I would, certainly.

Q. Now during the time that Dr. Gage was employed there, that is, I believe from the 2nd of August 1946 to the 18th of October 1946, did you have any complaints from any of the veterans as to his decision?

A. One.

Q. Just one? A. That is right.

The Court: That is the one you mentioned a while ago?

The Witness: That veteran did not complain to me. Only one in person came to me. He said he had been denied a pair of shoes and he had been getting them.

By Mr. Sullivan:

Q. Was he an outpatient?

A. He was an outpatient.

Q. Do you remember what his name was?

A. He was from up around Oxnard. I don't know whether his name was Valentino or not.

Q. Valentine was it?

A. Valentine I believe it is.

Q. When Mr. Valentine came and complained to you, did you call in Dr. Gage and discuss it with him?

A. I did not at that time because this investigation was going on and I had nothing to do with it. I didn't say [66] yes or no what to do about it because I had turned this complaint over to the investigating department out there and I had never been told it was settled and I didn't bother. I could say later though he was furnished his

(Testimony of Dr. Frank L. Long)

shoes. But at that time he came and told me that the doctor said he thought he could modify his own shoes.

Q. That Dr. Gage had informed him that in his opinion they could modify the shoes that he had?

A. Yes, but he apparently changed his mind and sent for him to come back and his shoes were issued to him.

Q. You did, after Dr. Gage was employed there, have some discussion with him in relation to the contract which existed between the Veterans Administration and Mr. Tomsone?

A. He thought that there should be two, that the veteran should have the choice of more than one contractor, and I said that that probably would be all right but they have only given us one contract and that is all we can work with.

Q. He told you, didn't he, that the reason he felt that there should be some other contractor to make shoes was that he was getting a lot of complaints from the veterans to whom orders had been given to have shoes furnished by Mr. Tomsone that the shoes were not made right?

A. He never complained to me about any particular individual or group of individuals not being satisfied, to my knowledge. I know over a course of time there have been a [67] few, even before he came there, that we would have difficulty in satisfying. I don't recall him ever speaking to me specifically about any individual case. His chief complaint was that we only had one contractor, that the man ought to be permitted to go to more than one place.

Q. Didn't he complain to you that Mr. Tomsone was not making his shoes according to the specifications contained in the contract which he had?

A. He never made such a statement to me.

(Testimony of Dr. Frank L. Long)

Q. You never heard such a complaint from Dr. Gage at all?

A. Not as to that. He spoke, as I told you before, that we ought to have a second contractor.

Q. Did he tell you why they ought to have a contract with some other person?

A. That the man ought to have a choice to go to be better satisfied.

Q. Did you ask him why he felt the man should have a choice?

A. No, I didn't. I told him we couldn't go to anybody else, that they had only given us one contract to work with.

Q. Now since this contract that went into effect on July 1, 1946 with Mr. Tomsone, have you had any complaints from the veterans in relation to the manner in which Tomsone [68] was making their shoes?

A. We have three now that have not been settled, that they are complaining about not being fitted. It is the only three that I can recall. There are several others probably that maybe I don't know about, which haven't been brought to my attention. But I know of three. They have occasionally occurred over the life of the previous contracts to my knowledge because it has been difficult to fit everybody and, generally speaking, except during the wartime we did have more complaints then about leather and the like, but his answer was that things were hard to get, and I guess they were. I don't know.

Q. In other words, since the war is over you haven't had, so far as you know, any complaints about the quality of the leather?

A. Not quality. Occasionally as to the fit, as to the proper fitting of the shoes.

(Testimony of Dr. Frank L. Long)

Q. Have you had any complaints about Mr. Tomsone failing to put in a metal brace in the shoe when the specifications called for it?

A. Not to me. It wasn't brought to my attention.

Q. You have your copies of these documents which have been admitted in evidence here as Government's Exhibits 4 and 5? A. Yes. [69]

Q. Would you kindly refer to Government's Exhibit 4?

A. I don't have the copy for the one for the regional office. I do have it for the hospital and home.

Q. You do not have this one?

A. No, I do not have that one.

Q. Well, referring here to Government's Exhibit 4, take the month of July, at the top you have the month and then "No." appears, is that not true? A. Yes.

Q. Does that mean the number?

A. That is the number of shoes.

The Court: How much longer are you going to be with this witness?

Mr. Sullivan: I probably won't be more than a few minutes. We should take a morning recess, I suppose.

The Court: We will take it now. Short recess. Remember the admonition.

(Short recess.) [70]

The Court: The usual stipulation?

Mr. Neukom: Yes, your Honor.

Mr. Sullivan: Yes, your Honor.

The Court: You may proceed.

Q. By Mr. Sullivan: Doctor, referring to Government's Exhibit 4, that is a summarization of the number of arch supports, modified shoes and new shoes that were

(Testimony of Dr. Frank L. Long)

ordered during the months of July, August, September, October and November through the outpatient department.

A. That is right.

Q. And those orders all refer to the veterans who were considered as outpatients by the administration?

A. Well, some of those might have been in the hospital and been in the soldiers' home department. They were the ones that were to be furnished these things through this contract through the outpatient department.

Q. Well, isn't No. 5—

A. Oh, pardon me. This is the outpatient and this is the hospital home. You are right about that.

Q. So, so far as Government's Exhibit No. 4 is concerned it relates only to arch supports, modified shoes or new shoes that were ordered for patients who were considered as outpatients?

A. That is right.

Q. And so far as Government's Exhibit No. 5 is concerned [71] it relates to the number of new shoes, arch supports and modified shoes that were ordered for patients who were inmates of the—

A. The soldier's home.

Q. The soldier's home? A. Yes, sir.

Q. Doctor, as far as you are concerned you have no ill feeling toward Dr. Gage, have you?

A. None whatsoever. I have had no complaints as to medical qualifications at all from a medical standpoint.

Q. And you are here solely because you are subpoenaed here as a witness by the Government?

A. That is right.

Q. Is that not right? A. That is right.

Q. And you are on a salary at the Veterans Administration, are you not? A. That is right.

(Testimony of Dr. Frank L. Long)

Q. And you expect to be paid your salary even though you are spending part of your time here in court, do you not?
A. That is right.

Q. Now, do you know a doctor out there by the name of Dr. Levine?
A. Yes, sir.

Q. Dr. Koon?
A. Yes. [72]

Q. Dr. Kane?
A. Yes.

Q. You are aware of the fact that they have been subpoenaed as witnesses on behalf of the defendant in this matter, Dr. Gage, are you not?

A. I heard he was out there and subpoenaed these doctors. They never told me they were but I have been told that they were subpoenaed.

Q. You had some discussion with them about being subpoenaed here as a witness, didn't you?

A. No. I mentioned to Dr. Levine—asked him was he subpoenaed but not the other two and I was wanting to know because I would have to cover their work if they were gone. That was the object of it as I remember it.

Q. Well, you informed those doctors, did you not, that they appeared in court in response to a subpoena served to testify as a witness on behalf of Dr. Gage and that they would not be paid for their time that they were away from the administration?

A. No, I never discussed that point with them at all.

Q. Never made such statement to either Dr. Levine, Dr. Kane or Dr. Koon?
A. I did not.

Mr. Sullivan: I think that is all, your Honor.

The Court: Any redirect examination? [73]

Mr. Neukom: Just one question, your Honor.

(Testimony of Dr. Frank L. Long)

Redirect Examination

By Mr. Neukom:

Q. You assigned Dr. Gage to the orthopedic service which you testified you understood that he was especially qualified for, during the months of August or September. Did he ever complain to you with regard to that assignment?

A. Just a few days before—

Q. I am asking about August or September.

A. Not through August or September.

Mr. Neukom: That is all.

Mr. Sullivan: I have no further questions.

Mr. Neukom: Dr. Long, I would like to ask you this question: What were the names of the doctors—is it Dr. Levine?

Mr. Sullivan: Yes, Dr. Kuhn and Dr. Kane.

Mr. Neukom: Will you please when you return to the Facility direct both of those doctors to appear here in court?

The Witness: Me direct them?

Mr. Neukom: You have the authority.

The Witness: They are subpoenaed. They would have to come anyway. I cannot control that.

Mr. Neukom: Well, you suggest to them that they honor the subpoena and appear in court.

The Witness: They will have to do that. They have [74] enough judgment to respond to a subpoena.

Mr. Neukom: That is all.

The Court: The witness may step down. Call your next witness.

Mr. Neukom: Mr. Tomsone.

HUBERT TOMSONE,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Hubert Tomsone.

Direct Examination

By Mr. Neukom:

Q. Your address, Mr. Tomsone?

A. 426 South Hillview.

Q. Los Angeles? A. Yes, sir.

Q. You will have to talk a little louder, please.

A. All right.

Q. Try to talk to the jury—so the jury may hear you.

A. All right.

Q. You have a business here in Los Angeles known as the Hubert Orthopedic Service? A. Yes, sir.

Q. And you have been in the orthopedic work for about how long, Mr. Tomsone? [75]

A. Oh, since 1928.

Q. Just tell us generally what the orthopedic work is that you have trained yourself for or have become experienced in.

A. All right. I started in this business when I was an orphan. My parents died when I was eight years old. I was raised in a home in Europe.

Q. Unfortunately we do not want to go into your entire life background. I want you to tell us about the work itself, the orthopedic work.

A. Well, the orthopedic work consisting, according to doctors' specifications where if a person has a short leg or he has a deformity of a foot or anything of that sort,

(Testimony of Hubert Tomsone)

that they are limping, this work is consisting of making cork extensions. Is made out of plaster Paris to raise them, to balance equal so that their spine will be equally balanced.

First of all, in this kind of work what we do is the job that when a doctor gives us a prescription to do a certain kind of work we have to follow them just as they prescribe. I am not a doctor. I just take orders as a doctor tells me to do. Some of the cases those shoes has to be built with metatarsal pads where those boys have cal-louses or overweight to carry their weight on the arch instead of the ball of their foot. So in this particular contract of the Government's there was about 51 different items and this 51 [76] different items, consisting of a special shoe first order and repeat orders. The first order is an order where the doctor prescribes the first time. Repeat orders is when the person gets the second pair of shoes which was prescribed the first time.

Then there is also a kind of work on the shoes—if a shoe has to be made by plaster cast or by wooden lasts, and those also go as a repeat, as first and second orders. Then there are another type of work, an orthopedic shoe, where orthopedic shoes could be a standard orthopedic shoe and also a specially made orthopedic shoe prescribed.

The job that I do for the Government is a job that where a shoe is prescribed, specially made orthopedic shoes by measurements and when we make those shoes we generally give the patient one or two try-ons before we finish the shoes to find out if a person has a callous or if he has bunions or if he has shortening in his leg.

First, we get the shoes—first we get the leather and—no, first, we take the measurement of the person's foot.

(Testimony of Hubert Tomsone)

Second we cast him. Third we go ahead after we cast the foot and we take a plaster of Paris and we take the bandage off.

The Court: Do you consider all this material?

Mr. Neukom: Well, I don't.

The Witness: It comes to the point, your Honor—

The Court: Just a moment. [77]

Q. By Mr. Neukom: I do not care to go further. Are you a craftsman in that particular line? I mean by that, you have made shoes and these devices that you have been talking about? A. Yes, sir.

Q. You have done the actual work yourself?

A. That is right, and my man who works for me.

Q. And you have a contract, a present contract which is Government's Exhibit 3, here with the original office in the Veterans Administration, do you not?

A. Yes, sir.

Q. And in connection with your contract did you put up a bond for faithful performance? A. Well—

Q. Just say yes or no. A. Yes, sir.

Q. And in what amount? A. For \$1,000.

Q. And was that a surety bond?

A. Yes, from the Aetna Company.

Q. Before this contract which started here last summer, did you have other contracts with the hospital or the Veterans Administration in Sawtelle?

A. Yes, I have been having contracts with Sawtelle Hospital, Birmingham Hospital, Long Beach, San Diego and San [78] Fernando. In other words, I have 27 Government hospitals under contract which takes care from San Diego to Santa Barbara.

(Testimony of Hubert Tomson)

Q. And do you call at the Veterans Administration since this new contract is in effect? A. Yes.

Q. About how many times a week—the one out here in Sawtelle?

A. In Sawtelle? Every Tuesday and Friday at two o'clock.

Q. And do you go out there and if the doctor directs you to take casts and other things of the feet of the veterans do you do so? A. That is right.

Q. And after that you follow the prescriptions that the doctor gives you in an attempt to make the shoe or the device according to the prescription, is that correct?

A. Yes, sir.

Q. And then carry on like you have generally informed us, is that correct? A. Yes.

Q. Do you make any shoes or any devices for any veterans without first obtaining the prescription or the approval of the doctor?

A. I do not make any shoes unless I have a prescription by the doctors. [79]

Q. Are you acquainted with the defendant in this case, Dr. Gage? A. The first time I knew him—

Q. Just say yes or no. A. Yes, sir.

Q. And when did you first meet him?

A. I met him after I came back from my vacation, the second day of September. That is the day after Labor Day.

Q. And where was that? A. Sawtelle Hospital.

Q. Was that in the Regional Office?

A. At the outpatient.

Q. And after you met Dr. Gage did you have occasion to fill any orders or start working on any orders or ortho-

(Testimony of Hubert Tomisone)

pedic devices or shoes that were prescribed by Dr. Gage?

A. Yes, sir.

Q. And did you make more than one of such devices or shoes?

A. Yes, sir.

Q. In connection with your work with the Facility and the Veterans Administration, have you received complaints from time to time about your work?

A. Well, I received some kind of complaint by the veterans and I told the veterans—

Q. You have answered the question. You have received [80] complaints?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And you have received more than one complaint, have you not?

A. That is right.

Q. Have you in each instance endeavored to correct it?

A. Yes.

Q. The complaint?

A. Yes, sir. Always made maybe new shoes or correct the one I had already done without charge.

Q. Now, after you had met Dr. Gage at the Facility—I understand the first time you met him was shortly after your return from your vacation?

A. That is right.

Q. Early in September?

A. That is right.

Q. Did you ever have occasion to have a conversation with Dr. Gage with respect to how your business was?

A. Yes, sir.

Q. And when was that to the best of your knowledge?

A. Well, this was on Tuesday, the following day after Labor Day that I came back to work at Sawtelle, after my vacation. [81]

Q. And where did that take place?

A. The following Friday he asked me how is business.

(Testimony of Hubert Tomson)

Q. Where did that take place?

A. Inside of the Veterans Hospital in his office.

Q. Dr. Gage's office? A. Yes, sir.

Q. Who was present, if anyone, besides you and Dr. Gage? A. Well, there was himself and I.

Q. And that was the Friday after the Tuesday that you had come back from your vacation?

A. Yes, sir.

Q. In the early part of the September of this year?

A. That is right.

Q. Will you relate what Dr. Gage said to you and what you said to him in that conversation?

A. All right. He asked me, he says, "How is business?" I says, "Business is good." And he says to me, "Well, I don't think so," and I says, "Why?" and he says to me, "Well, I know there has to be a lot of change around here in this Facility because there has been a lot of veterans who have been getting shoes from the Government which is not entitled to them. Now, you tell me that business is good. And I know from my prescriptions I have cancelled quite a few orders on contract—" Just a minute, how do you say it? "Because you [82] thought that these boys might be entitled to shoes." And I say, "I don't think in my thinking that those boys are entitled to shoes." I said, "That is your business."

And from one word to another he says to me, "When you address me you call me Dr. Gage," and I said, "For your information when you address me," I said, "you call me Mr. Hubert." I say, "Feeling in that matter is not against one another." I say, "You are here as a doctor to prescribe and I am here as a contractor to fulfill what you subscribe me to do."

(Testimony of Hubert Tomsone)

He walked away. I walked away. The following time that I go back to Sawtelle—

Q. Now, was that the end of that conversation?

A. That is right.

Q. You go to the hospital on Tuesdays and Fridays, is that correct?

A. Yes, sir.

Q. And this occurred on Friday to the best of your recollection?

A. That is right.

Q. Now, the next time that you went back to the hospital what day was that?

A. It was on Tuesday.

Q. The following Tuesday, is that correct?

A. That is correct. [83]

Q. Did you then have a conversation with Dr. Gage?

A. Yes.

Q. And where did it take place?

A. In the hallway.

Q. In the hallway? Where is the hall?

A. In the front of his office in the outpatient.

Q. What was said?

A. He said to me, "Hubert," he says, "I am sorry that I talked to you like that last Friday but I like you. I want to talk to you about something very important."

And I said, "What is it all about?"

He said to me, "You know, I have been rejected by the Board of the Medical Association here in Los Angeles twice." He says, "Furthermore," he says, "I am only making \$6,000 a year and after all, I am not here for my health. I got to make money somehow."

And I said to him, I said, "This is one part that I don't want to have nothing to do."

So he says to me, "Well, you think it over and I will see you later."

(Testimony of Hubert Tomson)

So, I walked out from his office down through the hall and I was kind of nervous. I didn't know what to do. So as I walked down through the hall I saw Dr. Van Franklin. He stopped me and he said—

Q. Now, wait a minute. We won't go into what you said [84] to Dr. Van Franklin. The conversation you had with Dr. Gage is what we are interested in at this time. Do you recall whether that was all that he said?

A. That is all he said that day.

Q. Then you walked down the hall and you met a Dr. Van Franklin?

A. Van Franklin.

Q. And you talked with him?

A. Well—

Q. Just say yes or no.

A. Yes.

Q. Then did you see Dr. Gage again that day?

A. Yes, for a prescription which he already had issued for some orders for the boys who came out to Sawtelle for this kind of work.

Q. You saw him again that day, is that correct?

A. Yes, sir.

Q. And did he talk to you about any matters that he had talked to you earlier about that day?

A. He says to me that he would like to talk to me about this proposition that he was not out there for his health. He said he had to make some money somehow because he had to have money to pay off some of those persons who might help him to get a license for the State of California.

Q. Did he say anything to you about orders for you? [85]

A. He said if I would play ball with him that he could make me have a lot more business than what I had now

(Testimony of Hubert Tomsone)

because he knew that the orders I have been getting at the present when he was there wasn't enough for me to take care of my contract, but I told him that I had enough work to take care of veterans and also my own customers for a long time, so if it slacked up a little bit I didn't mind. That is the reason why I went on my vacation.

Q. Well, during that conversation was there any conversation about him seeing you again at the hospital or any place?

A. The following—I don't recall if it was on Tuesday or Friday, but I saw Dr. Gage again at his office to get prescriptions and he says to me, "Hubert, you are selfish. There are a lot of people who make money on the outside and also a lot of physicians who get so much money as a monthly—as a monthly present sent him from other doctors, and I told him that I didn't want anything to do with it. He says to me, "Here is my address. I want you to come over."

Q. May I interrupt now? Pardon me. I show you what has been marked for identification Government's Exhibit No. 6, the little sheet of paper, and I ask you if you have ever seen that before? A. Yes.

Q. Who handed that to you? [86]

A. Dr. Gage.

Q. When he handed it to you did he have a conversation or tell you anything?

A. He told me to go down to his apartment and talk to him about this matter for us to make money on the side so that he would be in Sawtelle to prescribe shoes and he wanted me to give up my contract so that he could reopen a new bid under an assumed name as a professional

(Testimony of Hubert Tomsone)

shoe service instead of orthopedic service, and he told me he would like to have me as a silent partner. I would be doing all the work in the shop and he will prescribe all the work on the inside so that we could make a lot of money.

Q. Did he say anything, though, about what this writing on this was when he handed it to you? Did he hand it to you?

A. He handed it to me in his office in his own handwriting.

Q. What did he say it represented?

A. He told me to come down to see him to his apartment to discuss this money proposition that he wanted to make on the side, and for me to cancel my contract.

Q. I mean, did he tell you what this was? Can you read this?

A. Yes. This is the William Tell Apartments, 250 South Santa Monica Boulevard, Santa Monica. [87]

Q. Did Dr. Gage tell you that was his home?

Mr. Neukom: I would like to offer this in evidence.

The Court: Received.

(The document referred to was marked as Government's Exhibit No. 6, and was received in evidence.)

Q. By Mr. Neukom: Now, did you ever go to Dr. Gage's home as indicated on Government's 6?

A. No, I didn't.

Q. Your answer is that you did not? A. No.

Q. Did you call him up on the telephone?

A. I called him up the following day at the Veterans Administration.

(Testimony of Hubert Tomson)

Q. Now, had you reported this matter to Dr. Long up to this time?

A. Yes, I have reported to Dr. Long from the first day when the conversation started that he wanted money from me.

Mr. Sullivan: Just a moment. We will object to any conversation had with Dr. Long.

The Court: The objection is sustained and the jury is instructed to disregard the last statement of the witness, that he wanted money from him.

Q. By Mr. Neukom: Did you report the matter to Dr. Duncan?

A. Yes, sir; I have reported to Mr. Duncan. [88]

Q. Now, you say you called him up on the telephone the following day after the last conversation that you related and was that where—where did you talk to him? Where were you?

A. I was at my shop.

Q. And you called the Veterans Hospital or the Regional Office?

A. The Veterans Administration, Outpatient.

Q. Did you ask for Dr. Gage?

A. Yes, sir.

Q. And did you talk to Dr. Gage?

A. Yes, sir.

Q. Did the voice sound like the voice of Dr. Gage?

A. Yes, sir.

Q. Do you remember just what you said and what he said?

A. I told him that I could not meet him at his home, which I didn't want to.

Q. Well, it isn't what you didn't want to do. You told him that you could not meet him?

A. I told him that I could not meet him at his home and in the meantime—

(Testimony of Hubert Tomisone)

Q. Wait a minute. Is that all you told him?

A. Yes.

Q. Or did you have any other conversation with him?

A. Well, I told him that I could not meet him at his [89] home. Then he says to me, "Why don't you come out here today and meet me at noon," and I asked him where. I said "Where would you want to meet me? At the front entrance of the hospital?"

He said, "No, meet me at Wilshire and Sawtelle Boulevard."

So, before that, as I said, I reported to Mr. Duncan.

Q. Wait a minute.

The Court: Is that all the conversation?

The Witness: No. So I get in my car—

Q. By Mr. Neukom: Did he tell you what time to meet him?

A. About twelve o'clock I get in my car. I get on Wilshire Boulevard and I got to Sawtelle. It was about quarter to twelve, and I was sitting in my car waiting at Sawtelle Boulevard and Wilshire, so I was sitting there waiting a few minutes; and a few minutes later, must have been about 12:10 or 12:15, Dr. Gage comes up to my car and I said to him, "What did you want me to do?"

He said, "Well," he said, "I am hungry."

I said, "Well, I guess it would be a good thing for us to go for dinner."

I drove toward Westwood. He says to me, "There is no good place in Westwood to eat." He said, "Turn around [90] here on Wilshire. We will go down to the Mayfair Restaurant at Wilshire Boulevard and Santa Monica."

(Testimony of Hubert Tomisone)

Q. May I interrupt here? A. Yes.

Q. Had you advised Mr. Duncan, the Assistant Manager of the Veterans Outpatient, that you were going to meet Dr. Gage?

A. Yes, sir. I called him right after I talked to Dr. Gage.

Q. All right. Now, you turned around and you headed toward Santa Monica?

A. Yes, Santa Monica, that is right.

Q. And where did you go?

A. At the Mayfair Restaurant.

Q. In Santa Monica? A. Santa Monica.

Q. And you went in there and ate dinner?

A. We walked in, yes.

Q. With Dr. Gage? A. Yes. We walked in.

Q. The answer is yes? A. Yes, sir.

Q. During the dinner did you have any further discussion with regard to this proposition or these matters that you have previously testified to? [91]

A. Yes, sir.

Q. And who was present? I mean right at your table. Was anyone else present besides you and Dr. Gage?

A. When I got up I was introduced to Mrs. Gage when she came in and recognized him at the table and he introduced me to this Mrs. Gage, and we shook hands, and as I looked at Mrs. Gage I turned around and I saw Mr. Duncan, who was there.

Q. But at your table as you ate your dinner who was present? A. Just Dr. Gage and I.

Q. Where was Mrs. Gage?

A. She came in as we was getting up to leave. We already were through dinner.

(Testimony of Hubert Tomsone)

Q. Now, before Mrs. Gage got there did you and the doctor have any other conversation about what you have previously testified to? A. Yes, sir.

The Court: We will take a recess until two o'clock.

(Whereupon, at 12:00 o'clock noon a recess was had until 2:00 o'clock p.m. of the same day.) [92]

Los Angeles, California, December 11, 1946, 2:00 o'clock p.m.

The Court: Any ex parte matters?

The Clerk: No, your Honor.

The Court: United States v. Gage. Are you ready?

Mr. Sullivan: Yes, your Honor.

Mr. Neukom: Yes.

The Court: Usual stipulation?

Mr. Sullivan: Yes, your Honor.

Mr. Neukom: Yes, your Honor.

The Court: There was a witness on the stand.

Mr. Neukom: Mr. Tomsone, will you resume the stand?

HUBERT TOMSONE,

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Neukom:

Q. At lunch time, Mr. Tomsone, we were at lunch in Santa Monica. You were having lunch in a place with Dr. Gage. Now will you please relate to the jury—first,

(Testimony of Hubert Tomsone)

was this about the 3rd of October or the early part of October of this year? A. Yes, sir.

Q. While you were at lunch, will you relate to the jury [93] the substance of the conversation between you and Dr. Gage?

A. Well, we were having lunch together, that is as I said before, and his wife come in and I was introduced to her as his wife, and I told her, "Pleased to know you."

The Court: That was after you finished lunch. You told us about that. Now what he wants to know is what you said to Dr. Gage and what Dr. Gage said to you.

The Witness: Dr. Gage told me that he would like to have out of this contract a hundred dollars, and I told him, I said, "A hundred dollars a month?"

He said, "Hell, no, \$100 a week."

I say, "Gosh, I don't want to get into this."

He said, "Well, I can show you that there are many doctors who get complimentary each month as eye doctors or any other physician so that the appreciation has been given to them for the customers that they send you through the time."

And I told him, I said, "I don't know. I sure don't like to get into any mess like that because I don't want any part of it."

He said, "You are not getting into any mess like that. You see, I know what is going on in Washington." And he says to me that for him he was going to resign on the 15th day of the month, and in the meantime he thought if I would pay him the \$100 a week that he might not resign.

So as we drove back— [94]

Mr. Neukom: Just a moment.

(Testimony of Hubert Tomsone)

Q. Was there anything said during that conversation about more shoe orders?

A. Yes. As we were driving back he said to me, "From now on you will see the difference in orders in shoes, starting today."

This conversation was taken on Thursday.

Q. Just a moment. Let me interrupt you. Did you at any time, either in the cafe or as you were driving back, tell him that you would pay him the \$100?

A. I would tell him that I would pay him the \$100 but I could not make up my mind whether I would or not.

So he said, "Well, you take your time. In the meantime we are going to issue a lot of shoes starting today."

When I took Dr. Gage back to the Veterans Administration I drove up to see Mr. Duncan, and I told Mr. Duncan—

Mr. Sullivan: Just a moment. I am going to object to any conversation had with Mr. Duncan.

The Court: Only conversations you have had with the defendant Dr. Gage are admissible.

The Witness: I see.

By Mr. Neukom:

Q. Did you see Mr. Duncan when you went back to the hospital? A. Yes, sir. [95]

Q. And you had a talk with him? A. Yes, sir.

Q. Now did you have another talk with Dr. Gage a few days later?

A. That was the following day, Friday.

Q. Where did that take place?

A. Inside his room.

Q. You mean his office? A. His office.

(Testimony of Hubert Tomsone)

Q. Who was present?

A. Well, Dr. Gage and I.

Q. Do you recall what was said during that conversation?

A. He told me that he would wait for me to give him the \$100, and I told him that I couldn't afford to pay him, and he said, "Well, I have to make more money because I just come back from downtown and they refused me to give me my license to practice in the State of California."

I told him that if he needed the money I was advised to pay him by check. So I throw my checkbook on top of the table.

Q. Speak up.

A. I put my checkbook on top of his table there, on his desk, and I told him, "Here, write yourself a check," and he says to me, "No, I don't want any check. This is strictly cash." [96]

Well, I told him that I didn't have no cash, and he told me that he would collect from me the next time he see me.

He told me in the meantime there was going to be a holiday, that he was going to be off for a few days, and this holiday that he took must have been four or five days because the following Tuesday I went back there and Dr. Gage was not there. So in the meantime—

Q. Now let's stop there. Did you, after you had the lunch with him at Santa Monica about October 3rd, did you observe as to whether you got more shoe orders than you had in the past? A. The following day; yes.

Q. How many shoe orders did you get the following day? A. About 12 pair.

(Testimony of Hubert Tomson)

Q. Were they prescribed by Dr. Gage?

A. They were prescribed by Dr. Gage and this young lieutenant, whose name is—

Q. Strachan?

A. —Strachan, and also from Dr. Nie where Dr. Gage has told them.

Mr. Sullivan: Just a moment. We move to strike that as a conclusion and hearsay.

The Court: He hasn't said anything yet.

Mr. Sullivan: We will object to him testifying to what somebody else said. [97]

The Court: Objection sustained.

I don't understand the answer to your last question. The question was whether or not these shoe orders were signed by Dr. Gage, and you mentioned several other person's names.

The Witness: Yes, sir.

The Court: You mean they were signed by several persons?

The Witness: It was signed by two other doctors besides Dr. Gage.

The Court: Each prescription?

The Witness: Well, yes.

The Court: You mean each one had three names on it?

The Witness: No. You see, there are three doctors on the Facility who issue orders.

The Court: How many did Dr. Gage sign?

The Witness: Well, I do not recall.

The Court: All right.

By Mr. Neukom:

(Testimony of Hubert Tomson)

Q. Now on October 18th or thereabouts, Friday, were you out at the Facility or out at Dr. Gage's office?

A. Yes.

Q. And did you have a conversation with Dr. Gage there at his office on or about October 18th?

A. Yes, sir.

Q. Who was present?

A. In the office of Dr. Gage was Dr. Strachan, a veter- [98] an who was entitled to an artificial limb which was prescribed—

Q. I don't want you to go into the preliminaries, but I want to get where you were having a talk with Dr. Gage. Was anyone else present then? A. No.

Q. Did you have a cup of coffee with Dr. Gage in the afternoon, or a little after noon on October 8th?

A. At 3:30.

Q. Your answer is, you did? A. Yes, sir.

Q. Before that had you had a talk with Dr. Gage in his office? A. Yes.

Q. And about what time would you say that was?

A. It must have been about 3:15, because he was late.

Q. It was about 3:15, is that your answer?

A. Yes, sir.

Q. Will you tell us what was said?

A. Well, as I went inside in my room to take plastic casts and fittings of the veterans, Dr. Gage had arrived around about 3:30.

The Court: What he wants to know is what was said.

The Witness: Yes, sir.

It was said that if I brought the money out— [99]
By Mr. Neukom:

(Testimony of Hubert Tomsone)

Q. Who said that? A. Dr. Gage.

Q. What did he say? Just tell us as near as you can remember.

A. He says to me if I have the hundred dollars.

Q. What did you say? A. I say yes, sir.

Q. What else was said?

A. And I told him if he wants the money there now. He says to me, "Not here." He says to me, "Let's go down to the canteen to have a cup of coffee."

We went down to the canteen and I told him, "Do you want your money here?"

He said, "Not here." He say, "We will go outside."

As we were going outside—

Q. Who is we?

A. Dr. Gage and I. As we walked out there on the parking lot, he made me go near his car.

Q. Just state where you went to.

A. To the parking lot where his car was parked.

Q. All right.

A. It is in the parking lot of the Veterans Administration.

He say, "You can give it to me now." [100]

Q. Where were you? Were there any other cars there?

A. There were a lot of cars parked.

Q. Were there any people near the cars that you were near?

A. Well, the closest person was—there were four or five of them—was the FBI.

(Testimony of Hubert Tomsone)

Q. Was there anyone right near where you were with Dr. Gage near his car, anyone right up close to where you and he were?

A. Well, this particular person must have been about 150 feet away.

Q. When you got there, what did you do?

A. I took my money out of my pocketbook and I gave him the money.

Q. How much money did you give him?

A. \$100.

Q. Before that occasion had you made a list of the money that you had in your hand or in your pocketbook?

A. Yes, sir.

Q. Have you got the list here? A. Yes, sir.

Q. Will you please give it to me?

A. (Producing list.)

Mr. Neukom: May this be identified?

The Clerk: No. 7. [101]

(The list referred to was marked Government's Exhibit No. 7 for identification.)

By Mr. Neukom:

Q. You have shown me a little slip of paper, Government's Exhibit 7 for identification, and it has some writing upon it? A. That is right.

Q. There appear to be 20s, then certain numbers, 10s and certain numbers and 5s and certain numbers.

A. That is right.

Q. Is that your writing?

A. It is my wife's writing.

(Testimony of Hubert Tomsone)

Q. It is your wife's writing?

A. It is my wife's writing because I discussed this matter with my wife.

Q. It is your wife's writing, that is your answer?

A. Yes, sir.

Q. But when you checked this list, your wife's writing, you had checked that with money that you had in your possession?

A. Yes, sir.

Q. On the 18th of October?

A. We wrote the money number—

The Court: He asked you if you checked it with the list.

The Witness: Yes, sir. [102]

By Mr. Neukom:

Q. And you found that this list, the serial numbers, were they the same as the money that you had in your pocket?

A. Yes, sir.

Q. Or in your billfold?

A. Yes, sir.

Q. Now did you hand Dr. Gage some money—I don't know whether I asked you that or not—while you were near the car, did you hand him some money?

A. Yes, sir.

Q. How much money did you hand him?

A. \$100.

Q. I show you what appears to be a roll of bills, three 20s, three 10s and two 5s. Will you check that with the list and see if it is your recollection that this is the money that you handed to Dr. Gage?

A. (Examining list) Yes, sir.

Q. That is the \$100 you handed Dr. Gage there at the parking lot, is that correct?

A. Yes, sir.

(Testimony of Hubert Tomsone)

Q. And this clip, was there a clip around the money?

A. Yes, sir.

Q. Will you fix it just the way it was, as you recall it, when you handed it to Dr. Gage?

A. (Illustrating) Like that. [103]

Q. What did Dr. Gage do with the money, as you observed?

A. He got the money and he put it in his left-hand pocket.

Q. Pants pocket? A. Pants pocket.

Mr. Neukom: I would like to offer in evidence Government's Exhibit No. 7 for identification, and likewise offer in evidence the hundred dollars in bills.

The Court: Both will be admitted as one exhibit.

(The articles referred to were received in evidence and marked Government's Exhibit No. 7.)

By Mr. Neukom:

Q. After you had handed Dr. Gage this money, what did you and he do?

A. We walked back inside in his office.

Q. There at the Veterans Administration?

A. At the Veterans Administration.

Q. We walked in?

A. We walked in and he locked the door shut.

Q. Did you then shortly after that leave Dr. Gage's office? A. Yes, sir.

Mr. Neukom: You may take the witness. [104]

(Testimony of Hubert Tomsone)

Cross Examination

By Mr. Sullivan:

Q. Mr. Tomsone, I understood you to testify on direct examination that you had been in the business of making orthopedic shoes since about 1928, is that correct?

A. I have been making orthopedic shoes since 1928.

Q. You haven't, however, been in business for yourself as an orthopedic shoemaker since 1928, have you?

A. No, sir.

Q. When did you first go into business for yourself, that is, in the business of manufacturing orthopedic shoes?

A. It is not manufacturing, it is custom-made orthopedic shoes.

Q. Well, making them then?

A. Yes, hand-made.

Q. When did you first go into that business for yourself?

A. In my own store?

Q. Yes. A. About eight years ago.

Q. That would be about 1938?

A. That is right.

Q. Prior to that time you had worked for other people who made orthopedic shoes, is that right?

A. That is right. [105]

Q. And you worked for various shoemakers prior to that time?

A. That is right; yes.

Q. Have you been in business for yourself continuously since 1938?

A. That is right.

(Testimony of Hubert Tomsone)

Q. When did you first have a contract with the Veterans Administration to make shoes for veterans?

A. About three and a half years ago, because this last contract is only about five or six months now. This is my fourth year.

Q. Is this the second or third contract you had with the Government?

A. This is my fourth.

Q. This present contract went into effect on the 1st of July of 1946?

A. That is right.

Q. Now Dr. Gage was not employed at the Veterans Administration when you obtained this contract which is now in existence, was he?

A. That is right.

Q. And you had no acquaintanceship with Dr. Gage until after he went to work out at the Veterans Administration?

A. That is right.

Q. When was it that you first met Dr. Gage? [106]

A. The day after Labor Day on Tuesday at 2:00 o'clock.

Q. That was in September of 1946?

A. That is right.

Q. You had been on your vacation for a period of time immediately preceding Labor Day of 1946, is that correct?

A. I came back Labor Day.

Q. How long had you been away on your vacation?

A. Three weeks.

Q. After you first met Dr. Gage on the Tuesday following Labor Day of 1946, you would see him on an average of about twice a week, is that correct?

A. Well, it would be twice a week through the week, but I see him 10:00 to 12:00 fifteen times each time every Tuesday and Friday at Sawtelle Hospital.

(Testimony of Hubert Tomson)

Q. What I mean by that, you might see him for a few minutes and do something else and then come back and see him again? A. That is right.

Q. But you saw him on an average of two days a week?

A. Well, two afternoons, from 2:00 to a quarter to 5:00.

Q. That was the occasion when you went there to procure whatever prescriptions had been ordered by the doctors in the orthopedic department for orthopedic shoes?

A. That is right. [107]

Q. And for corrections in shoes, is that correct?

A. Yes, sir.

Q. You didn't interview the veteran who had the prescription, that is, you didn't always make it a practice of interviewing the veteran who had the prescription for shoes at the Veterans Administration there, did you?

A. I don't understand what you mean.

Q. Well, what I mean is this, that many times a veteran would be given a prescription for a pair of shoes?

A. Yes, sir.

Q. And the first time you would see the veteran would be when he made an appointment and come into your shop to see you?

A. Well, in my shop or at the Veterans Administration.

Q. Yes, but there were many instances where you didn't see the veteran out at the Veterans Administration but saw him for the first time in your shop?

A. No, it could be in my shop or at the Veterans Hospital.

Q. Yes. A. Not on the outside.

(Testimony of Hubert Tomsone)

Q. It might be one of the two places?

A. That is right.

The Court: He wants to know if sometimes you didn't see the veteran and do your business at your shop and never see [108] him at the Administration.

The Witness: No. Many times they were sent to me with a prescription down at the shop for me to take the measurements of plastic cast.

The Court: Then would you see him later at the Veterans Administration?

The Witness: Yes, for approval from the doctor.

The Court: The veteran would have to be there?

The Witness: The veteran has to be there with his shoes.

The Court: When the doctor approves them?

The Witness: So that the doctor approves that the work is done correctly.

By Mr. Sullivan:

Q. In other words, that was after the shoes were made?

A. Yes, and also for conversation through the doctor how this shoe has to be built by Dr. Nie.

Q. You would often see the veteran there after the shoes had been made, is that right?

A. Not even fittings.

Q. Were all of your fittings had out at the Veterans Administration?

A. Not all of them, but when the veteran receives a shoe from me I am not allowed to give the veteran the shoe. These shoes has to go back to Sawtelle where a doctor, he has examined the workmanship and he has to

(Testimony of Hubert Tomsone)

sign that it has been [109] inspected by an M. D. The physician who puts his name on it would be Dr. Gage, it could be Dr. Nie or it can be the other young fellow, Dr. Strachan. So when the doctors put their name on there that he inspected the shoes, that means the shoes has been okayed by the physician for merchandise and workmanship.

Q. So it was your custom then after making these shoes to deliver the shoes out to the Veterans Administration at Sawtelle?

A. That is right.

Q. For the inspection and approval of the doctor who had written the original prescription?

A. That is right.

Q. Is that correct?

A. It has to be the doctor who wrote it. It don't have to be the doctor who wrote the prescription, it can be one of those three doctors.

Q. Even though the doctor who approved it might not have been the one who had wirtten the prescription?

A. That is right.

Q. But did you do that only in cases where you made new shoes, that is, new orthopedic shoes, or did you do that where you had to make some correction in a shoe which the veteran was already wearing?

A. Well, many times a shoe could be ordered from the [110] doctor. Many times those boys come from maybe 50, 75, 80 miles away from Sawtelle Hospital. That is what we call an outpatient. This certain patient sometimes don't have the facilities to travel back and forth so therefore the doctors many times prescribe this certificate for the work to be done on their own shoes, and

(Testimony of Hubert Tomsone)

they put on it "expedite." The only way we do this work, if we have this tag approved by the doctor with his signature that the man cannot return to the Facility because he is unable to get back in time, therefore the doctor will approve it and rely upon me to think that the work might be done right. But before I issue any orders out from my shop I make the veterans sign a card if the shoes are satisfactory to his foot, and if he is satisfied he signs it. I get that card back to the Veterans Administration where it shows that the man has been satisfied and he has got the shoes. I keep the receipt, and maybe 30, 60 days later I get my money for it.

Q. But it was your custom not to deliver the shoe to the veteran until he signed a card of acceptance that the shoes were satisfactory?

A. It is not my duty to deliver shoes to no veterans.

Q. I mean, there were some instances where you did deliver them to him?

A. Let me make this clear. When I get an order from Sawtelle and this shoe is supposed to be delivered by me, I [111] personally go myself and fit these particular people who have so much trouble with their feet. I want to make sure that the shoe is fitted properly so they can walk straight and that they will be happy and I will be happy so that I will not cheat them out of anything they got coming to them.

Q. There were some instances where you delivered the shoes directly to the veteran at your shoe shop, isn't that right?

A. Providing that those are marked "expedite" and signed by the physician.

(Testimony of Hubert Tomson)

Q. But there were instances where you did that, isn't that true? A. Sir?

Q. There were instances where you delivered the shoe direct to the veteran at your place of business?

A. I don't understand the word you say before.

Q. You don't understand what?

A. I don't understand the word that you told me before. Would you mind repeating it?

Q. Were there some occasions, some times, when you would deliver the shoe to the veteran at your place of business?

A. The way we do deliver these shoes, if the veteran has been fitted at Sawtelle for a plastic cast or by measurements, when these shoes are made and the veteran is unable to [112] come to Sawtelle to receive them, therefore we deliver those shoes to Sawtelle for inspection through the doctors so that the doctor can sign for the workmanship.

The Court: Just a moment. Will you read the question again?

(The question referred to was read by the reporter, as follows):

("Q. Were there some occasions, some times, when you would deliver the shoe to the veteran at your place of business?")

The Court: Now answer that yes or no. Then you can explain afterwards.

The Witness: If I deliver the shoes to the veterans—

The Court: Just a minute. Read the question again.

(Testimony of Hubert Tomisone)

(The question referred to was re-read by the reporter, as follows:

("Q. Were there some occasions, some times, when you would deliver the shoe to the veteran at your place of business?")

The Witness: Yes, sir.

By Mr. Sullivan:

Q. All right. Now whenever you delivered the shoe to the veteran at your place of business, did you require the veteran to sign a card of acceptance showing that the shoes were satisfactory to him? [113]

The Court: I think he answered that a while ago, counsel.

Mr. Sullivan: Maybe so.

The Court: He said he didn't do it unless he got an order to expedite and when they did they fitted them and he got a card and sent it to them and he kept a receipt.

By Mr. Sullivan:

Q. Now, then, you hadn't seen anything of Dr. Gage prior to the time that you went on your vacation in August of 1946?

Mr. Neukom: That has been asked and answered several times.

The Court: Objection sustained.

By Mr. Sullivan:

Q. The first conversation that you ever had with Dr. Gage was on the Tuesday following Labor Day of 1946?

A. That is right.

(Testimony of Hubert Tomsone)

Q. And it was in that conversation, if I understand your testimony correctly, that Dr. Gage said to you, "How is business"? A. No.

Q. Was it the following Friday that that conversation took place? A. That is right.

Q. In other words, it was the second time, or the second day that you ever met Dr. Gage? [114]

A. The second time of the week, not the second day of the week.

The Court: I think we all understand it was the second occasion that you saw Dr. Gage.

By Mr. Sullivan:

Q. And you say that you said to him, "Business is good"? A. That is right.

Q. And he said to you, "I don't think so"?

A. That is right.

Q. What did he say after that?

A. What did he say after that?

Q. Yes.

A. He say, "You kidding. I know. I have canceled a lot of your orders because they are men who were never entitled to shoes. Now you tell me that business is good, which I know you are just kidding."

Q. Well, had your orders fallen off up to that time?

A. It was, but I will not admit it to him because I didn't want him to interfere in my business.

Q. You objected to him interfering in your business?

A. That is right. I didn't want to have him to have any part in my business. My business is my own and I want to take care of it myself to my best ability to satisfy those veterans. [115]

(Testimony of Hubert Tomson)

Q. As far as you were concerned you felt that you knew more about that business than he did?

A. No.

Mr. Neukom: I object. This is argumentative.

The Court: Objection sustained.

Mr. Neukom: I will accept the answer.

By Mr. Sullivan:

Q. Now you say that your business had fallen off up to that time?

A. I said it was but I have not said—

The Court: Just a minute now. You said it was. You have answered the question.

The Witness: Yes, sir.

By Mr. Sullivan:

Q. You engaged in somewhat of an argument with him at that time, didn't you?

A. Well, the argument was just a misunderstanding, that he wanted me to call him Dr. Gage and I wanted him to call me Mr. Hubert.

Q. You both got a little hot-headed at that time?

A. Not exactly. It was just conversation.

Q. It wasn't a particularly friendly conversation, however, was it?

A. I will not say it was unfriendly because a good understanding makes business good. [116]

Q. Now the next time that you saw Dr. Gage was the following Tuesday? A. That is right.

Q. And he told you at that time that one of you said to the other, "I am sorry that I talked to you that way last Friday"? A. He said that to me.

(Testimony of Hubert Tomisone)

Q. He said that to you?

A. He said, "But I like you."

Q. But I like you? A. That is right.

Q. What else did he say?

A. He say he wants to talk to me.

Q. What about, did he say?

A. He says to me that he was not out here for his health, that he has to make money because he was only getting \$6000 a year.

Mr. Neukom: Go ahead. Have you finished?

The Court: Have you finished?

The Witness: No.

He says he has to make some money because he was only getting \$6000 a year, and he has been rejected for the second time from the Medical Association of California.

By Mr. Sullivan:

Q. He said he had been rejected for the second time [117] from the Medical Association of California?

A. That is right.

Q. Is that right? A. Yes.

Q. What else did he say at that time?

A. He couldn't get the license.

Q. Did he say anything else?

A. And he had to make some money, that he wanted to give me a proposition where we can both make a lot of money on this contract.

Q. Did he tell you anything further at that time?

A. I guess for that day, I think that is the best I can remember so far. There might have been some more discussion, but I don't recall.

(Testimony of Hubert Tonisone)

Q. You have no independent recollection of anything further that was said on that occasion?

A. There might have been said more, but I am giving you my explanation the best I can remember, the truth.

Q. When did you next see him and have a conversation with him?

A. Well, it must have been the following Tuesday or Friday.

Q. The following week sometime?

A. Well, it could have been in that same week; could have been on Tuesday or Friday. [118]

Q. What did he say to you on that occasion, and what did you say to him? A. The following Friday?

Q. Yes.

A. Well, he just thought that if I thought it over, and I told him no, that I didn't think that I wanted to get into any mess like that.

Q. Was anything else said at that time?

A. There might have been.

Q. I mean, do you recall anything else that was said at that time?

A. Not at the present. There might have been said more.

Q. Was it on that occasion that you say he gave you this slip of paper with his address on it?

A. He says to me, he said—

The Court: Just a moment. Follow the question. Was that the occasion he gave you the slip of paper?

The Witness: That must have been the occasion, your Honor.

The Court: All right. You have answered the question.

(Testimony of Hubert Tomsone)

By Mr. Sullivan:

Q. Now Dr. Gage up to this time had complained to you from time to time about the shoes that you had been making on prescriptions that were reissued by the Veterans Adminis- [119] tration out there, hadn't he?

A. He had been asking me if I was making those shoes.

Q. And he told you that on various occasions that the shoes were not being made according to the specifications contained in the contract, didn't he? A. No.

Q. Never at any time did he make any statement to you about the shoes not being built according to the specifications contained in the contract?

A. No. He didn't say anything like that because his point of view was that I would play ball with him and he wouldn't dare to tell me those things because I would have given him a good answer.

Mr. Sullivan: I move to strike the answer as not responsive.

The Court: The answer is stricken. The jury is instructed to disregard it.

Mr. Neukom: Pardon me. The "no" may remain in?

The Court: Everything except the word "no."

Mr. Sullivan: That is all right.

The Court: Mr. Tomsone, if you just try to answer the question, follow the question closely and just try to answer it, then we will save some time and it won't take so long.

The Witness: All right.

(Testimony of Hubert Tomsone)

The Court: You will have an opportunity to explain any- [120] thing that you desire before you answer the question.

The Witness: Yes, sir.

By Mr. Sullivan:

Q. Did you ever have any conversation with Dr. Gage in which he told you that you were making an incorrect charge to the Government for lifts on shoes when you had a prescription to put a lift in a shoe and were charging the Government for an extension of the shoe?

A. Can I explain that, your Honor?

The Court: You can answer yes or no. If you can't answer it yes or no you can state that you cannot answer it yes or no.

The Witness: I cannot answer that question if you don't let me explain.

The Court: You can explain, but can you answer it yes or no and then explain?

The Witness: I can answer yes or no on this conversation, but I would like to explain.

The Court: You can explain, so answer it yes or no.

The Witness: Yes.

The Court: All right. Now you can explain.

The Witness: There are many types of orthopedic shoes done for the Government, as I said before. When we sign a contract the contract reads a build up of an inch is \$5, and every additional inch therefore is 50 cents. It could be an [121] inch and a half, which would be \$5.50. An inch and three-quarters would be \$5.50. An

(Testimony of Hubert Tomson)

inch and seven-eighths would still be \$5.50. If you go over two inches it will be \$6.

On this particular case that you are trying to bring out so strong, I will explain it to you. When a doctor issues an order to me to build a shoe for a quarter of an inch I told the doctor that I thought it was too much. I told him the truth. I say, "But if it is a possibility that you would like to give me a non-contract item, then I will make that job cheaper than \$5," and he agreed to it. Instead of charging \$5 I charged \$2.50. When the job was completed he inspected that particular work, and as he inspected it if he did not like it he would tell me, "Hubert, this job is not done right, will you do it over again."

The Court: Did he say that to you?

The Witness: No.

The Court: We don't want what he would have said if something happened but just what he said.

The Witness: He would not say at that time no, but then there has been certain types of work that he had said that. I took the shoes back to the shop many times, and many times Dr. Gage he has made a mistake himself.

Mr. Sullivan: I move to strike that as a conclusion of the witness.

The Witness: No, I will tell you the reason. [122]

Mr. Neukom: I think it ought to go out.

The Court: It may be stricken. It isn't a question anyhow.

The Witness: Your Honor?

The Court: We will get around to that after a while. What he wants to know now is your explanation of this.

The Witness: The reason why I said that, your Honor, is because I saw a man over here yesterday—

(Testimony of Hubert Tomsone)

Mr. Neukom: Wait a minute. Don't argue with the Court. Just answer the questions.

The Witness: That is not arguing, this is a true fact.

The Court: I know, but you just answer the question. Have you finished your explanation?

The Witness: Not yet, your Honor.

The Court: All right. Leave out this other business.

The Witness: This man, Dr. Gage, sometimes he has prescribed—

The Court: Just a moment now. Mr. Tomsone, you are here as a witness and you are not here to conduct the trial of this case.

The Witness: Okay.

The Court: You will have to answer the questions and abide by my rulings on what you can say or what you cannot say. If you have finished your explanation about this particular transaction you may proceed with the examination. Have [123] you finished your explanation?

The Witness: No, I have not, your Honor.

The Court: All right.

The Witness: This particular shoe that sometimes there is mistakes prescribed when a man walks on the outside of the foot like this (illustrating), therefore it throws the balance of the foot. We usually put what we call a dutchman on the outside of the shoe, and we put an orthopedic here on the inside so that his foot will be twisted back to normal so that he can have balanced bearing when he walks instead of walking like that. (Indicating)

One time, as I recall—

The Court: Is this about this particular transaction?

The Witness: Yes, your Honor.

(Testimony of Hubert Tomson)

The Court: All right.

Mr. Neukom: This is a shoe lift that he is asking about?

The Witness: Yes.

In this particular case this gentleman that has come to my shop two or three times, instead of the built on the outside of the shoe Dr. Gage has prescribed to put a built on the inside of the shoe. When the man received the shoe, instead of being balanced equally by building the inside on the sole, inside of the heel, naturally it will turn that man's foot out more and his ankle hurts more. So Dr. Gage asked me if I would please reverse this particular case because it [124] was a mistake, and I said, "All right, I will do that."

He say, "Will there be any charge?"

I say, "No."

By Mr. Sullivan:

Q. Was that the only instance?

A. No, there were several of them.

Q. There were occasions then when Dr. Gage had complained to you about the way the shoes had been made, is that right?

A. He has not complained to me.

Q. Never at any time? A. Never at any time.

Q. All right. Now as I understand your testimony—

The Court: Just a moment, counsel. I still want to get this explanation straight.

This was the occasion when you charged \$5 and he said that that was too much and you said that that is a minimum charge for an inch or less, isn't that right?

The Witness: That is right.

(Testimony of Hubert Tomsone)

The Court: And you said that if you will make it a non-contract item I will make it less than the contract calls for?

The Witness: That is right.

The Court: And you did in this instance?

The Witness: Yes, sir. [125]

The Court: All right.

By Mr. Sullivan:

Q. Now on this occasion when you say that Dr. Gage gave you his address on this slip of paper, you say that he asked you to come and see him at his home sometime?

A. The following Thursday night.

Q. The following Thursday night?

A. That is right.

Q. But you did not go to his home?

A. No, sir. I don't want to have nothing to do with him.

Q. You never at any time went to his home?

A. Never.

Q. But you did call him out at the Veterans Administration out there?

A. The following day. That was on Wednesday.

Q. On Wednesday? A. Yes.

Q. He didn't call you at your place of business?

A. No, he didn't call me. I called him.

Q. You phoned him? A. Yes, sir.

Q. And you told him you couldn't meet him at his home?

A. I told him that I couldn't go to his home. When I called the following day, it was on Wednesday morning

(Testimony of Hubert Tomson)

about [126] 10:30. Then he told me, "Why don't you come out here? I want to talk to you."

So I phoned Mr. Duncan and I told him that I was going—

Q. Just a moment.

I move to strike that.

The Court: It may be stricken, what he told Mr. Duncan, and the jury instructed to disregard it.

By Mr. Sullivan:

Q. But you were the one that phoned Dr. Gage and made the appointment to meet him out at Sawtelle?

A. Oh, no. I didn't want to make no appointment with him. He told me to come out anyway that day, that he wanted to see me.

Q. Then you went out there? A. That is right.

Q. Now that, as I understand it, was on the 3rd of October. A. Somewhere around there.

Q. How did you fix that time as being around the 3rd of October?

A. I didn't say it was the 3rd because I do not remember. I know it was on Wednesday.

Q. Was it during the month of October?

A. I don't remember. Yes, it was in the month of October. [127]

Q. And you went with him to the Mayfair Hotel in Santa Monica for lunch?

A. Just a minute. You say this was the 3rd you asked me?

(Testimony of Hubert Tomsone)

Q. I understood you to testify on direct examination that it was the 3rd of October. I am only taking your word for it.

A. Well, no, I am not sure but, you see, I come back from my vacation the day after Labor Day. That was on Monday. Tuesday I met Dr. Gage for the first time. It must have been in October.

Q. It must have been in October? A. Yes, sir.

Q. And you say that when you were in the Mayfair Hotel you saw Mr. Duncan in there?

A. It is not the Mayfair Hotel, it is the Mayfair Restaurant.

Q. The Mayfair Restaurant, I should say. You saw Mr. Duncan in the restaurant?

A. I did not see Mr. Duncan until after Dr. Gage and I, his wife came in the front of our table.

The Court: You didn't see Mr. Duncan until you finished the conversation?

The Witness: That is right. [128]

By Mr. Sullivan:

Q. Where was Mr. Duncan when you saw him?

A. He was right behind me.

Q. Standing right in back of you?

A. When I got up I saw him. I was facing his back.

Q. How close was he to you?

A. From here to there. (Indicating)

Mr. Neukom: Indicating about two and a half feet?

The Witness: Yes, something like that.

(Testimony of Hubert Tomsone)

By Mr. Sullivan:

Q. You didn't see him until you got up from the table?

A. That is right.

Q. Was he standing or was he seated at the table at that time?

A. At that time he was standing.

Q. With his back to you?

A. Well, I don't know if you would call it his back because I was sitting in this position here this way (indicating), Mr. Duncan was with his back turned to me. When I got up I done this way (indicating) and I saw him in there standing, and the side of his face, which would be on this side here. (Indicating)

Q. If I understand your testimony correctly, it was while you were having lunch at this Mayfair Cafe that Dr. Gage told you he would like to have \$100? [129]

A. He says to me that it would be a good idea for me to cancel my contract and for me to be his silent partner and for him to bid on a contract and open up a new orthopedic shop under the assumed name of Professional Orthopedic Shoes.

Q. He told you that down at the Mayfair Cafe?

A. Yes.

Q. Was that the first time that he ever suggested anything to you about you canceling your contract?

A. He told me before that that he thought it would be a good idea for me to give up my contract because if I would give up the contract that he knew someone on the outside who was tickled to death to take that contract and play ball with him.

Q. He said he knew someone on the outside who would be tickled to death to take the contract and play ball with him?

A. That is right.

(Testimony of Hubert Tomsone)

Q. What did you say about that?

A. I told him that I worked hard enough for this contract and I am going to stick to it. This has been through the war that I haven't made no money under this contract and I couldn't get good leather. I never went out and bought any black market merchandise. When I couldn't get very good leather, the first thing I done I went up to see Captain Bell, who was an assistant of Colonel Bringham at the Veterans Administration. [130]

Q. Is this part of the conversation with Dr. Gage?

A. Yes.

Q. All right.

A. I told him that I have to see personally Dr. Bell, that the merchandise that I was using was not the first grade as the contract required, but he asked me, "Hubert, do you think you can do a little bit better later on?"

And I say, "I think so. I am shopping around to try to find better merchandise all the time."

He said, "All right. As soon as you do that you let me know again." And when I got my first shipment of leather from the Pacific Hide & Leather Company—

The Court: Did you tell him this?

The Witness: Yes, sir.

The Court: All right.

The Witness: When I got my first shipment of leather from the Pacific Hide & Leather Company, I go up to see Dr. Bell and Dr. Bell told me, "It is all right. You go ahead and do as you have been performing before. Your work has been very satisfactory so far."

(Testimony of Hubert Tomsone)

By Mr. Sullivan:

Q. Well, now, after this present contract went into effect, that is, the contract which is now in existence, were you able then to get top grade of leather?

A. Now you mean? [131]

Q. Yes. A. Yes.

Q. And have you all during the time that you had this contract since July 1st, 1946? A. Yes, sir.

Q. That contract of course provides that the shoes are to be made out of prime grade leather?

A. That is right.

Q. And you have been using prime grade leather in all shoes under that contract? A. Yes, sir, I have.

The Court: I see it is 3:00 o'clock and time to take our recess.

(Short recess.) [132]

The Court: The usual stipulations?

Mr. Sullivan: Yes.

Mr. Neukom: Yes.

The Court: You may proceed.

Q. By Mr. Sullivan: Now, Mr. Tomsone, you testified on direct examination that following the day, following your conversation with Dr. Gage at the Mayfair Hotel that you received orders for 12 pairs of shoes. You are sure of that? A. Sir?

Q. You are sure of that, are you?

The Court: Read the question.

(Question read.)

The Witness: No, this was not at the Mayfair Restaurant. This was the day after when I saw Dr. Gage following Friday—the following Friday I received 12 pairs of shoes but not in the Mayfair Restaurant.

(Testimony of Hubert Tomsone)

Q. By Mr. Sullivan: You didn't get the order down at the Mayfair? A. No, sir.

The Court: He said it was the following Friday, I think.

Q. By Mr. Sullivan: The day after the next Friday?

A. The following Friday.

Q. And you went to the Mayfair on Wednesday? [133] A. That is right.

Q. And it was the following Friday that you received this order for 12 pairs of shoes? A. That is right.

Q. Those were prescriptions that were written by either Dr. Gage or Dr. Strachan or Dr. Nie?

A. That is right.

Q. You have no independent recollection as to how many prescriptions were written by each one of those three gentlemen, have you? A. No, but—

Q. Now, let me ask you this—

The Court: Had you finished your answer?

The Witness: No, sir.

The Court: Go ahead and finish.

A. You see, Dr. Gage told me at the Mayfair Restaurant, "From today on you will see when you come out Friday, you will see how many pairs of shoes you have," and I received 12 pair from the veterans which he told me that he was going to instruct Dr. Nie and Dr. Strachan to issue an order on shoes.

The Court: Can you hear the witness now?

Several Jurors: Not very well.

The Court: Did you hear him, Mr. Juror, Juror No. 1?

Juror No. 1: Not very well.

The Witness: Do you want me to repeat it? [134]

(Testimony of Hubert Tomsone)

The Juror: No.

The Witness: When I left the Facility on Friday I received these 12 orders of new shoes.

Q. By Mr. Sullivan: Anything else?

The Court: Just a moment. The question was, do you remember how many of those orders Dr. Gage gave you?

The Witness: No, I don't, your Honor.

Q. By Mr. Sullivan: Now, you have already told us that the Friday following the Tuesday that you first met Dr. Gage, when you first had this conversation with him in which he asked you, "How is business?"—that would be the Friday following Labor Day. You told us that up to that time your business had fallen off some, is that correct?

A. I said that the business was falling off but I did not tell Dr. Gage.

Q. You did not tell him that? A. That is right.

Q. That it had fallen off up to that time. Now, had your business further decreased—that is, had you received less orders between that time and this Friday when you received the order for 12 pairs of shoes?

A. It increased from Wednesday to Friday.

Q. But up until Wednesday—between—withdraw that for a moment.

If you don't understand this, tell me, but between [135] the time that you had this first conversation with Dr. Gage in which he asked you how business was and this Wednesday sometime in October when you went to the Mayfair with him, had your business further decreased?

A. It decreased from—to that Friday, yes.

(Testimony of Hubert Tomsone)

Q. Do you recall that during the month of August you received orders for 14 pairs of shoes, don't you?

A. I don't remember.

Q. You don't remember? A. No.

Q. Do you recall that during the month of August you received orders for 19 arch supports?

A. I don't recall that.

Q. Do you recall that during the month of August you received orders for 19 modifications of shoes?

A. I don't, but if you want me to prove it to you I will bring my books out and I will prove it to you.

Q. Well, do you recall that during the month of September you received orders for more shoes, more new shoes than you had received for the month of August?

A. I couldn't say that. I will be glad to prove it to you if you let me bring my books?

Q. Then you don't know whether your business fell off during this period of time or not, do you?

Mr. Neukom: This is argumentative. [136]

The Court: Argumentative, yes. Objection sustained.

Q. By Mr. Sullivan: Do you recall that during the month of September you received orders for modification of 33 pairs of shoes? A. I don't remember.

Q. You have no recollection of it?

A. No, but I could prove to you if you let me bring my books.

(Testimony of Hubert Tomsone)

Q. Are you acquainted with a Mr. Fred Skill?

A. Yes, sir.

Q. Of Long Beach? A. Yes, sir.

Q. Did you ever work for Mr. Skill?

A. Yes, sir.

Q. Are you also acquainted with a Mr. H. Sherman at a shoe repair shop down at 9th and Main Streets?

A. Yes. He passed away five or six years ago.

Q. You knew him, though? A. Yes.

Q. You are also acquainted with Mr. Wright and Mr. Taylor who were with the Police Department in Long Beach, were you not? A. Yes.

Mr. Sullivan: I think that is all.

The Court: Next witness. [137]

Mr. Neukom: I have no further questions. Mr. Duncan, will you take the stand? I would like to have Mr. Tomsone remain in attendance, your Honor.

The Court: You will remain in attendance. Mr. Tomsone.

Mr. Neukom: He can go today but I may want him later.

The Court: Will you want him also?

Mr. Sullivan: Not today.

The Court: You will remain near a telephone where either Mr. Neukom or Mr. Sullivan can get in touch with you. In the meantime you will be excused.

Witness Tomsone: I will stay here.

CHARLES M. DUNCAN,

called as a witness by and on behalf of the plaintiff,
having been first duly sworn, was examined and testified
as follows:

The Clerk: State your full name.

The Witness: Charles M. Duncan.

Direct Examination

The Clerk: Your address?

The Witness: Quarters 36, Veterans Administration
Center, Los Angeles.

By Mr. Neukom:

Q. Mr. Duncan, what is your business or occupation?

A. I am employed by the Veterans Administration as
assistant to the manager of the Center at West Los
Angeles. [138]

Q. Who is the manager?

A. Colonel R. A. Brigham.

Q. And you were so employed during the months of
September and October of this year? A. Yes, sir.

Q. Did you have occasion to talk with Mr. Hubert
Tomsone with respect to matters that he reported to you
that were transpiring between him and Dr. Gage? Just
say yes or no. A. Yes, sir.

Q. When was the first time that was called to your
attention?

A. The first time by Mr. Tomsone was on October 1st,
1946.

Q. Prior to that in connection with your official
duties, had any of your other co-associates spoken to you
with regard to such a matter? A. Yes.

(Testimony of Charles M. Duncan)

Q. And when was the first date?

A. That was on September 30th.

Q. And is it part of your duties when working under the manager, to conduct investigations of any, or inquire in connection with, personnel? A. Yes, sir.

Q. Did you have occasion on or about October 3rd, 1946 [139] to be present in a cafe known as the Mayfair Cafe or Restaurant in Santa Monica? A. Yes, sir.

Q. Prior to that time had you witnessed around the hour of noon Mr. Tomsone meeting Dr. Gage?

A. Yes, sir.

Q. And where had you witnessed their meeting?

A. At the corner of Wilshire Boulevard and Sawtelle Boulevard.

Q. Was that in performance of your official duties or did you just happen to be casually there?

A. In performance of my official duties.

Q. Did you have occasion to follow the car driven by Mr. Tomsone which ultimately went to the Mayfair Cafe in Santa Monica? A. Yes, sir.

Q. Did you have occasion to see Mr. Tomsone and Dr. Gage partake of lunch? A. Yes, sir.

Q. You did not hear the conversation that ensued between them? A. I did not.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

Mr. Neukom: Mr. Davis. [140]

HOWARD H. DAVIS,

called as a witness by and on behalf of the plaintiff,
having been first duly sworn, was examined and testified
as follows:

The Clerk: State your full name.

The Witness: Howard H. Davis.

The Clerk: And your address?

The Witness: 900 Security Building, Los Angeles.

Direct Examination

By Mr. Neukom:

Q. That is your business address, isn't it, Mr. Davis?

A. That is correct.

Q. What is your business?

A. 10975 Rose Avenue, is the home address.

Q. What is your occupation?

A. Special Agent, Federal Bureau of Investigation.

Q. Assigned to the Los Angeles office?

A. That is correct.

Q. And in the performance of your duties were you
assigned to a matter in connection with the investigation
of one Dr. Gage and one Mr. Tomsone? A. I was.

Q. And to your best recollection when were you first
assigned to that?

A. Approximately October 1st. [141]

Q. This year, of course? A. Correct.

Q. And did you work in conjunction with Mr. Dun-
can, the man who has just been on the stand?

A. I did.

Q. And did you have occasion during that investiga-
tion to interview Mr. Tomsone? A. I did.

(Testimony of Howard H. Davis)

Q. On or about October 18, 1945, did you have occasion to observe Mr. Tomsone and Dr. Gage leaving the building where Dr. Gage's office is located there at the Outpatient offices? A. I did.

Q. What was the hour?

A. Approximately three o'clock in the afternoon.

Q. And did you observe where they went?

A. I did.

Q. Where did they go?

A. They first went to the canteen, which is in the same building but located down the corridor. They stayed there for, I would say, approximately ten minutes, at which time they both left the canteen and proceeded through the corridors to the outside of the building and to an auto park in the rear of the building. They stayed in that park for several minutes, at which time I observed them returning from [142] the auto park and I noticed that Dr. Gage was folding something between the fingers of both hands. They returned then—

Q. Now, let me interrupt. Prior to that occasion had you had occasion to make a list of \$100.00—an aggregate of \$100.00 in United States money? A. I had.

Q. And who had that money?

A. Mr. Tomsone had it.

Q. And you had talked to Mr. Tomsone about what time? A. Approximately 1:30 p.m.

Q. There at the Facility?

A. In the office of Mr. Duncan.

Q. At the Facility? A. At the Facility, yes.

Q. And had you made a list, comparable lists, as to the serial numbers of the money that Mr. Tomsone had?

A. I had.

(Testimony of Howard H. Davis)

Q. Do you have that list? A. I have.

Mr. Neukom: Does counsel care to see this?

Mr. Sullivan: That is right.

Mr. Neukom: Will you mark this Government's exhibit next in order.

The Clerk: Government's Exhibit 8, for identification.

(The document referred to was marked as Government's Exhibit 8, for identification.) [143]

Q. By Mr. Neukom: Is Government's Exhibit 8 for identification the list of the serial numbers and the description of the bills that Mr. Tomsone handed you for you to inspect and make a list of them? A. It is.

Q. And when you handed me this money, that is, Government's exhibit—part of Government's Exhibit 7 as I was examining Mr. Tomsone, you had had that money in your possession—I should have said Exhibit 8. You had had that money in your possession for some time, had you not?

A. It was in the office safe of the FBI.

Q. And you have examined that money with the list that is Government's Exhibit 8, is that correct, the serial number? A. I have.

Mr. Neukom: Let me straighten the record. Government's Exhibit 8 is the serial number, and Government's Exhibit 7 is the money? A. Yes.

Q. And they correspond?

A. They correspond, yes.

Q. Then you had given this money to Mr. Tomsone, is that correct? A. That is correct.

(Testimony of Howard H. Davis)

Mr. Neukom: I would like to offer Government's Exhibit 8 into evidence now, your Honor. [144]

The Court: It is admitted.

(The document referred to was marked as Government's Exhibit 8, and was received in evidence.)

Q. By Mr. Neukom: Now, after this incident and you saw Mr. Tomsone and Dr. Gage returning from the auto park back of the Facility, as I understand it, what did you see them do then?

A. They returned—re-entered the building and went back to Dr. Gage's office on what I believe is the ground floor and entered the office. We waited a short period of time to allow everything to clear. We had received a signal from Mr. Tomsone that the transaction had taken place. We then entered—

Q. Now, you say "we"?

A. "We" consisted of myself and Special Agent Malloy, Special Agent Leonard Augustson and Mr. Gordon L. Howe of San Francisco.

Q. You entered Dr. Gage's office?

A. That is correct.

Q. And you found him there?

A. Found him there.

Q. What did you say to him?

A. At the time we entered there was a patient there and an elderly doctor, who were requested to leave and the doctor advised he was under arrest and that anything he said [145] could be used against him in court.

Q. What did the doctor say or do?

A. Right at that moment he didn't say anything.

(Testimony of Howard H. Davis)

Q. You are referring to the doctor as being the defendant here? A. Dr. Gage.

Q. Later, within a matter of a few minutes, did he say anything or did you do anything?

A. We requested him to stand up. That is, I requested him to stand up and told him we were going to search him as we understood he had received some money. He stated as we started to search him, "It is in my left pocket," and started to reach for it and we told him not to do it, that we would take it out. Special Agent Malloy took it out of his pocket and handed it to me. About that time the doctor made the statement, "I expected this; I knew this would happen."

Q. Is that about the extent of the conversation that occurred the day that you placed him under arrest?

A. At that time in the office, yes.

Q. And you later took him to the offices of the FBI?

A. Correct.

Q. And he was booked in the County Jail, is that correct? A. That is correct.

Q. In connection with this investigation and on or [146] about October 15, 1946, did you have occasion in conjunction with Mr. Duncan of the Veterans Administration, to be listening upon a listening device in another room, to conversations that were taking place in the office of Dr. Gage? A. I did.

Q. On the afternoon, at the hour of close to two o'clock—and may I inquire first, during the conversation that you were listening to upon a listening device in an adjacent room, did you hear a voice which later appeared to be the same voice as the Dr. Gage whom you arrested on October 18th? A. I did.

(Testimony of Howard H. Davis)

Q. And did you at some time during that conversation hear a voice which appeared to be similar to the voice of Mr. Tomsone whom you had theretofore interviewed and talked to? A. Yes, sir; I did.

Q. And will you relate, and if you have no notes on the matter which will assist you in refreshing your recollection, unless you can recall it without notes—which is the case?

A. Well, I can generally recall the conversation. However, I have notes covering the period in question.

Mr. Sullivan: Mr. Neukom, what was the date of this?

Mr. Neukom: October 15th.

Q. Did you hear a voice make any reference to money?

A. I did. [147]

Q. What voice was that—what person was speaking?

A. Mr. Tomsone.

Q. What do you recall that he said?

A. He said, "I couldn't bring the money with me this time" or words to that effect.

Q. Did you hear another voice after that?

A. Yes, I did.

Q. And whose voice was that?

A. The defendant's, Dr. Gage.

Q. And what did that voice say?

A. He said, "That is all right, don't worry about it."

Q. Did you hear any further conversation?

A. The conversation became inaudible at times—appeared to be whispering. However, I heard Dr. Gage say, "Friday, uptown" and I heard Tomsone's voice answer, "Friday", which appeared to be in a questioning voice from the tone used.

(Testimony of Howard H. Davis)

Q. What else was said?

A. Then the next sentence I heard was Dr. Gage saying, "I had just as soon do business with you."

Q. And is that the extent of the conversation as nearly as you recall?

A. Relating to the question of money, yes. There was other conversation between the individuals appearing to be Dr. Gage with a patient and other things that did not concern [148] it.

Q. That was at an earlier time?

A. And shortly after they talked about Boston braces and where they were made and things like that—how to get their name.

Mr. Neukom: That is all.

Mr. Sullivan: I just have one or two questions, your Honor.

Cross Examination

By Mr. Sullivan:

Q. On this occasion, on October 19th, when you saw Dr. Gage and Mr. Tomson go from the canteen out of the building and over to the auto park, you watched them while they were in the auto park, did you?

A. They disappeared from my sight within the midst of the cars in the auto park.

Q. And then after disappearing from your sight you next saw them as they were coming back toward the building?

(Testimony of Howard H. Davis)

A. Before they cleared the auto park, yes.

Q. Before they left the auto park?

A. That is right, sir.

Q. And you say that you observed at that time that Dr. Gage was carrying something in his hand?

A. Holding something between the fingers of both hands.

Q. Did you continue to watch him as he was folding this? [149]

A. Until I had to switch from behind a car and get at a different angle there. I lost track of the situation of the hands.

Q. How far away from him were you at that time?

A. I would say approximately at the time they were clearing the entrance of the auto park perhaps 100 feet.

Q. Were you close enough that you could see what it was he was folding in his hand?

A. Just generally what it appeared to be.

Q. What did it appear to you to be?

A. It looked as far as texture, it looked dark as far as I know, and the position of his hands. It would appear to be about the size of money.

Mr. Sullivan: I think that is all I have. No further questions.

Mr. Neukom: Mr. Malloy.

PAUL MALLOY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Paul Malloy.

The Clerk: What is your address?

The Witness: 259 - 25th Street, Santa Monica. [150]

Direct Examination

By Mr. Neukom:

Q. Mr. Malloy, were you present at the time of the arrest—what is your business or occupation?

A. Special Agent with the Federal Bureau of Investigation.

Q. And were you such in October of this year?

A. I was.

Q. Did you have occasion to be present at the time of the arrest of Dr. Gage? A. I was.

Q. On the day of October 18th?

A. That is right.

Q. Along with Agent Davis? A. Yes.

Q. I show you Government's Exhibit No. 9 for identification, which I believe is not in your handwriting but bears initials—PJM. Is that your—are those your initials?

A. Yes.

Q. It appears to give a list of 20's, 10's, 5's dollar bills and their serial numbers. Were you present when the \$100.00 was taken from the pocket of Dr. Gage?

A. Yes; I was the one who removed it from his pocket.

Q. Of Dr. Gage? A. Yes. [151]

(Testimony of Paul Malloy)

Q. Did you check to ascertain whether or not what the serial numbers were upon that money that was taken from his pocket? A. Yes, sir, I did.

Q. And is that reflected on the instrument, Government's Exhibit No. 9, which is before you?

A. Yes, it is.

Q. And are those serial numbers the same as the serial numbers of the money that Mr. Tomsone—that had previously been checked into the possession of Mr. Tomsone? A. Yes, it is.

Mr. Neukom: I would like to offer in evidence Government's Exhibit No. 9.

The Court: It is admitted. Is this another list?

Mr. Neukom: This is the list after the arrest and there was a re-check.

The Court: Exhibit 8 is the list which Agent Davis made.

Mr. Neukom: That is right.

The Court: Very well.

Mr. Neukom: And Exhibit 7 is the money of Tomsone.

(The document referred to was marked as Government's Exhibit 9, and was received in evidence.)

Q. By Mr. Neukom: Mr. Malloy, prior to the arrest did you have occasion to see Dr. Gage and Tomsone leave his [152] office and go to the canteen?

A. Yes, I did.

(Testimony of Paul Malloy)

Q. Just relate briefly what you saw after that?

A. Dr. Gage came into his office at approximately 2:15 of that date and he had several short conversations with Tomsons. Tomsons went in the office one time and came out again and then at approximately three o'clock Dr. Gage came out of his office and Mr. Tomsons was passing in the hall at the time and I heard Dr. Gage say to him—Tomsons, "How about a cup of coffee?" and it was approximately five minutes after that that Dr. Gage again came out of his office, having returned to it, and he joined Mr. Tomsons in the hall. They went down the hall and turned in the corridor to the left leading down to the canteen of the building, and went on down in that direction. I followed them and they made again a left turn and I then lost sight of them, and in a few minutes I went down to the canteen and saw them sitting at the counter of the canteen.

Q. Did you see them in the parking lot after that?

A. No, I did not.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

Mr. Neukom: The Government rests, your Honor.

Mr. Sullivan: Shall we proceed, your Honor.

The Court: Do you wish to make an opening statement? [153]

Mr. Sullivan: No, I have no desire to make an opening statement. I would like to proceed with my evidence.

The Court: Very well.

HERBERT OUTEN AMREIN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name and address.

The Witness: Herbert Outen Amrein.

The Clerk: And your address?

The Witness: 866 West Mount Drive, Los Angeles.

Direct Examination

By Mr. Sullivan:

Q. What is your business or occupation, Mr. Amrein?

A. At the present time I am writing and doing some research work on my own.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. Yes, sir.

Q. How long have you known Dr. Gage?

A. Approximately ten months.

Q. And during that period of time has he resided here in Los Angeles County?

A. I believe so. I am not certain of that.

Q. Are you acquainted with other people that know him? [154] A. Yes.

Q. Friends and acquaintances? A. Yes, sir.

Q. Mutual friends and acquaintances of both of you?

A. Yes, sir.

Q. Are you familiar with his general reputation for honesty and integrity and as a law-abiding citizen?

A. Yes, sir.

Q. Is it good or bad? A. It is very good, sir.

Mr. Sullivan: Thank you, cross examine.

Mr. Neukom: No questions.

Mr. Sullivan: Mr. Kramer.

MELVIN KRAMER,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Melvin Kramer.

The Clerk: And your address?

The Witness: 1434 Kelton, Los Angeles 24.

Direct Examination

By Mr. Sullivan:

Q. What is your business or occupation, Mr. Kramer?

A. I am the owner of the Zanzibar Cafe in Santa Monica, [155] California.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at counsel table? A. I am.

Q. How long have you known Dr. Gage?

A. 15 years.

Q. Did you know him prior to the time he came to California? A. Yes, I did.

Q. And are you acquainted with other people that have known him in the community in which he has resided?

A. I know many people that know him.

Q. Are you familiar with his general reputation for honesty and integrity in the communities in which he has resided? A. I am.

Q. Is it good or bad? A. It is very good.

Q. That is all, thank you.

(Testimony of Melvin Kramer)

Cross Examination

By Mr. Neukom:

Q. Mr. Kramer, are you in any wise related to Dr. Gage?

A. Only through marriage. I am not directly related to Dr. Gage. His wife is my cousin. [156]

Q. His wife's maiden name was Kramer, is that right?

A. That's right.

Mr. Neukom: That is all.

Mr. Sullivan: Mrs. Lifland.

NELL LIFLAND,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nell Lifland.

The Clerk: What is your address?

The Witness: 6454 San Vincente.

Direct Examination

By Mr. Sullivan:

Q. Mrs. Lifland, what is your occupation, please?

A. Advertising for newspapers.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I am.

Q. How long have you known Dr. Gage?

A. I have known him about 10 years.

Q. Are you acquainted with people that have known him—that is, mutual friends and acquaintances in the community in which he has resided?

A. I do. [157]

(Testimony of Nell Lifland)

Q. Are you familiar with his general reputation for honesty and integrity and as a law-abiding citizen?

A. I have always known him to be honorable.

Q. You are familiar with his general reputation?

A. I am familiar.

Q. Is it good or bad? A. It is good.

Mr. Sullivan: You may cross examine.

Mr. Neukom: No questions.

The Court: Next witness.

Mr. Sullivan: Dr. Gage.

THEODORE S. GAGE,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Theodore S. Gage.

The Clerk: And where do you live?

The Witness: 2509 Santa Monica Boulevard.

Direct Examination

By Mr. Sullivan:

Q. Dr. Gage, you are the defendant in this matter, are you not? A. Yes, sir, I am.

Q. And what is your profession or occupation?

A. I am an orthopedic surgeon. [158]

Q. Are you licensed to practice in the State of California?

A. No, I am not licensed to practice in the State of California.

Q. Are you licensed to practice as an orthopedic surgeon in any other state? A. Yes, sir.

(Testimony of Theodore S. Gage)

Q. In what states are you licensed to practice?

A. Illinois and Missouri.

Q. Are you a graduate of any medical school?

A. Yes, sir.

Q. What medical school?

A. Loyola Medical College, Chicago, Illinois.

Q. And when did you graduate from medical school?

A. 1928.

Q. Following your graduation from medical school did you serve as an interne in any hospital or institution?

A. Yes, I did.

Q. Where was that?

A. At Columbus Hospital, Chicago, Illinois.

Q. How long of an internship did you serve there?

A. One year.

Q. Now, have you following your graduation from medical school and your internship specialized in any particular branch of the medical profession? [159]

A. I did general practice for approximately the first two years after I left my internship, and then specialized thereafter.

Q. In what branch of medicine or surgery did you specialize?

A. I specialized in orthopedic surgery.

Q. And have you had some special training in that respect?

A. Yes, sir, I have.

Q. And what training have you had so far as orthopedic surgery is concerned?

A. I served a preceptorship of approximately five years under Drs. Phillip Kruser and Frederick Muller of Chicago.

(Testimony of Theodore S. Gage)

Q. What do you mean by "preceptorship"?

A. I was associated as assistant to these men and got my training under them.

Q. And did they specialize in some particular branch of medicine or surgery?

A. They specialized in orthopedic surgery only.

Q. And when did you finish your preceptorship with them?

A. Approximately 1935.

Q. And did you thereafter go into practice for yourself?

A. Yes, sir, I did. [160]

Q. And where did you engage in practice? Thereafter?

A. In the City of Chicago at that time.

Q. And after going into practice for yourself did you specialize in any particular branch of medicine or surgery?

A. I limited my practice from then on to orthopedic surgery entirely.

Q. And how long thereafter did you continue to practice for yourself as an orthopedic physician and surgeon?

A. From that time on until my entrance into the Service.

Q. When did you enter the Service?

A. In 1942.

Q. And in what capacity did you enter the Service?

A. I entered as a commissioned officer in the United States Army Medical Corps.

Q. And were you assigned to any particular work or branch of medicine or surgery while in the Army?

A. Yes, sir.

Q. What particular branch of medicine or surgery were you assigned to in the Army?

A. I was assigned to orthopedic surgery.

(Testimony of Theodore S. Gage)

Q. And how long did you remain in the Army?

A. Until May 3rd, 1946.

Q. And during all of that time you were in the Army [161] were your activities confined principally to orthopedic surgery?

A. It was confined entirely to orthopedic surgery here in this country and in Europe.

Q. And you received your discharge then in May of 1946? A. That is right.

Q. Now, where were you practicing orthopedic surgery at the time of your entry into the United States Army?

A. Kansas City, Missouri.

Q. And where were you when you were discharged from the Army?

A. San Francisco, California. I was discharged from Letterman General Hospital. I was, rather, retired for disability.

Q. Following your discharge did you return to your former home in Kansas City?

A. No, not at that time.

Q. Did you thereafter come to Los Angeles County?

A. I came to Los Angeles in February of 1946.

Q. And did you come here at that time to make your home or were you here then merely on a visit?

A. No, not at that time. I had no intention at that time of making my home here.

Q. How long did you remain here? [162]

A. I remained here approximately three months while taking a post-graduate course.

Q. You took some post-graduate work in surgery or medicine?

A. Orthopedic surgery, some advanced special work.

(Testimony of Theodore S. Gage)

Q. Where did you take that post-graduate work?

A. At the College of Medical Evangelists, Los Angeles, California.

Q. Where is that located?

A. It is in Los Angeles, on Boyle Street.

Q. And following the completion of your post graduate work there what did you do?

A. I took the California State Board examination in March.

Q. That is, you mean—

A. The reciprocity examination between Illinois and the State of California.

Q. Was that examination which you took for the purpose of endeavoring to be licensed to practice medicine and surgery in the State of California?

A. That is correct, sir.

Q. You took that examination in March of this year?

A. In March of this year, yes.

Q. And were you thereafter informed as to what the result of that examination was? [163]

A. I was informed that I had failed.

Q. And what did you do thereafter?

A. I returned to Kansas City.

Q. How long did you remain back there?

A. I remained in Kansas City for approximately six weeks.

Q. When did you next come to California.

A. I came back to California in July, approximately July 29th, to take the August California State Board examination again.

(Testimony of Theodore S. Gage)

Q. And did you thereafter take another California State Board examination? A. Yes, I did, sir.

Q. And when did you take that?

A. I took that August 3rd, 1946.

Q. And at the time that you took that examination were you employed anywhere?

A. I had just begun—I hadn't—the employment had been consummated. I had made a commitment of employment but had not begun until the 5th of August.

Q. You had—you say you had made a commitment for employment? What steps had you taken to secure employment at that time or about that time?

A. I had no desire for employment except that when I came here to take that State Board examination in August I [164] had a letter from Dr. Long stating that there was an opening and that my name had been recommended and if I was interested to see him, and since I knew that I was going to take the State Board examination in August, and not figuring on failing at the second time, I took the position as in interim job.

Q. You say as an interim job. You mean—

A. Until I found out whether I had passed the California State Board examination.

The Court: What job was it that you took?

The Witness: The orthopedic surgeon's job at the Veterans Hospital.

Q. By Mr. Sullivan: And was it your intention if you passed the California State Board examination to engage in private practice?

A. That was the understanding I had with Dr. Long when I accepted the position.

(Testimony of Theodore S. Gage)

Q. In other words, you had some conversation with him at the time in relation to the possible length of time that your employment might last out there?

A. That is correct, sir.

Q. What did you say to Dr. Long about that and what did he say to you?

A. I told him that I was not particularly interested in an outpatient job since it entailed a lot of administration and I was not particularly interested in administration. My [165] work was entirely confined to operative surgery and reconstructive surgery, but that it was purely an interim thing—that I only wanted the job until I knew that I had passed, and at that time he said to me, "We would much prefer to have you full time and permanently. Your qualifications are the kind we want."

And I said, "Well, that would all depend upon whether I pass the examination or not," but my mind was made up at that time, that I was going to leave the minute I knew I had passed the examination.

Q. Did you then thereafter go to work at the Veterans Administration? A. I did, sir.

Q. And in what capacity were you employed?

A. As the chief of the orthopedic outpatient service.

Q. And what did your duties consist of in that position?

A. Well, my duties were two-fold. They were administrative and professional. As chief I had to examine patients and prescribe for orthopedic devices and supervise the two assistants assigned to that department. The administrative end consisted of ordering braces, artificial prosthesis, arms and legs, and the ordering or prescribing of orthopedic shoes and their correction.

(Testimony of Theodore S. Gage)

Q. Now, in connection with your duties there at the [166] hospital did you have occasion from time to time to examine veterans who were patients of the out-patient department there in relation to the need or necessity of being furnished with orthopedic or corrective footwear? A. I did, sir.

Q. And when these patients came in there for an examination was there any chart or folder or history of any kind of their case that accompanied them?

A. There was.

Q. And did you make some inquiry to determine where you were to order—from what source you were to obtain, let us say, orthopedic shoes or corrective shoes, when you found occasion to have to prescribe such orthopedic articles for these patients? A. I did.

Q. And what inquiry did you make to determine from what source those things were to be obtained?

A. I was informed by my clerical help there that the contract was held by one Hubert Tomsone and that all orders for orthopedic shoes and any correction footwear had to go to his company.

Q. Now, thereafter did you have occasion to see and inspect any contract that existed between the Veterans Administration at Sawtelle and Mr. Hubert Tomsone for the furnishing of orthopedic or corrective shoes? [167]

A. Yes, I did.

Q. And did you become familiar with the content of that contract and its provisions? A. I did.

Q. Now, in connection with your duties at the Veterans Administration at Sawtelle did you ever have occasion to examine any veterans where you reached a con-

(Testimony of Theodore S. Gage)

clusion as an orthopedic physician and surgeon, that it was not necessary that the veteran be furnished with orthopedic or corrective shoes? A. Yes, sir, I did.

Q. Now, what was your custom—

The Court: We will take a short recess as the Grand Jury is ready to report.

(Short recess.)

The Court: The record will show we are resuming the trial with the defendant present on the stand and the jury present and in the jury box.

Mr. Sullivan: Yes, your Honor.

Q. Dr. Gage, on those occasions where you made an examination of a patient and determined that, in your medical opinion as an orthopedic surgeon, it was unnecessary to prescribe orthopedic or corrective shoes, what did you do insofar as making any record of your findings and recommendations are concerned? [168]

A. I wrote my examination of the condition present, my reasons for refusing the request of the veteran for orthopedic shoes in the folder that accompanied the patient upon the time of the examination.

Q. And upon conclusion of the examination and your report, written report, which went into the folder, what happened to the folder insofar as that particular veteran was concerned?

A. The folder was placed in the outgoing basket on my desk and from there went to the orthopedic clerk's office and the chief clerk usually went through those folders to determine what prescriptions had been written for that day, and whenever they found a prescription they would type it up, the initial purchase order.

(Testimony of Theodore S. Gage)

Q. As I understand it, the folders were not kept in your own individual office after you had concluded with them?

A. As a rule they were not. There were only one or two exceptions. Whenever I had a patient that I was conducting a long series of examinations on, in those cases I might have kept the folder in my desk, but no recommendation for treatment had been entered as yet.

Q. As soon as you had completed your examination and consultation with the patient and reached your conclusions the case was closed so far as you were concerned and was sent back? [169]

A. That is correct.

Q. Now, who was your immediate superior at the Veterans Administration there?

A. At the time of my entrance upon my duties at the Veterans Hospital there were two doctors—Dr. Long was the chief medical officer and Colonel Strachan was the assistant.

Q. And for both Dr. Long and Colonel Strachan they were assigned to the Regional Office?

A. That is correct. We all worked out of the Regional Office.

Q. Was Colonel Strachan a doctor also?

A. Yes; he was a Lieutenant Colonel in the Medical Corps on active duty with the Veterans—assigned there for duty.

Q. And in the department to which you were assigned, that is, the orthopedic department, did you have any other

(Testimony of Theodore S. Gage)

doctors to assist you in the work which you were performing there?

A. At the time I took over the department there was one doctor, Dr. John Nie, who was an elderly gentleman and had been with the Facility for some 17 years or so.

Q. Thereafter was it necessary for you to ask for any further assistance, further doctors to assist you?

A. Yes, it was. [170]

Q. And did you—

The Court: Pardon me, counsel. I was wondering if we might not save time by recessing now and the lawyers in the case consult with me in my chambers concerning the instructions?

Mr. Sullivan: All right, your Honor.

The Court: May I inquire how many more witnesses you have? If you think the case will get to the jury tomorrow I think we had better get the instructions out of the way this evening.

Mr. Sullivan: That probably may depend on how late in the day your Honor might want to give the case to the jury.

The Court: Sometime tomorrow?

Mr. Sullivan: Yes, your Honor.

The Court: I would prefer to finish the case tomorrow if I can because I have another case set for Friday.

Mr. Sullivan: Yes, your Honor. I see no reason why we cannot conclude—certainly conclude this evidence tomorrow, your Honor. I do have a number of witnesses. I may after going into a huddle tonight determine to eliminate some of them. I am not sure of that as yet. But even if I should call them, there are none of them

(Testimony of Theodore S. Gage)

that I anticipate will take any great length of time to examine, either on direct or cross examination.

The Court: In addition to this witness? [171]

Mr. Sullivan: That is right, in addition to this witness.

The Court: Well, we will proceed for a few moments more and if you gentlemen can be here at 9:30 it may be more convenient than this evening.

Mr. Sullivan: As far as I am concerned, your Honor, that is satisfactory to me.

The Court: Well, we can recess at this time if you will be here at 9:30 in the morning. I think we can go over the instructions in a half hour.

Mr. Sullivan: All right.

The Court: I think this is a convenient time to recess. It is almost 4:30. We will recess until 10:00 o'clock tomorrow morning, at which time the jury will return to its place in the jury box.

(Whereupon, at 4:25 o'clock p.m., a recess was had until 10:00 o'clock a.m., December 12, 1946.) [172]

* * * * *

Los Angeles, California, December 12, 1946, 9:30 a.m.

(The following proceedings were had in chambers and without the hearing and presence of the jury:)

The Court: Are you ready, gentlemen?

Mr. Sullivan: Yes.

Mr. Neukom: Yes, your Honor.

The Court: The record will show the defendant is present in person and by his counsel.

Now, on the matter of general instructions—you are familiar with them, Mr. Sullivan?

Mr. Sullivan: That is right, Judge.

The Court: As to general instructions, without going over them now and reading them here, it takes about 25 or 30 minutes.

Mr. Sullivan: Yes.

The Court: You are familiar with them?

Mr. Sullivan: Yes.

The Court: Would they be satisfactory to you?

Mr. Sullivan: They are satisfactory; yes, sir.

The Court: That would take up many of the instructions that you have submitted here.

Mr. Sullivan: That is correct, your Honor.

The Court: So that we should devote our attention to the instructions which apply specifically and particularly to [176] this case.

Mr. Sullivan: Yes.

The Court: Let us take up the Government's instructions.

Government's proposed instruction No. 1 is a quotation of the statute.

I think we can probably omit reference to the house or Congress or Committee of either House and just go into the pertinent things:

"Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof," and omitting then down to:

"shall ask, accept or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, * * *"

The only thing he is charged with is receiving money, so why put all these other long words in here?

Mr. Neukom: I just merely quoted the statute.

The Court: "shall ask, accept or receive any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be [177] brought before him in his official capacity, or in his place of trust or profit, influenced thereby shall be * * * guilty of a crime."

Mr. Neukom: We ought to leave the words "gratuity and promise" in there and strike the other.

The Court: "who shall ask, accept, or receive any money or any promise or gratuity," is that it?

Mr. Neukom: That is right, and the rest can go out.

The Court: "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may be law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be guilty of a crime."

I shall also add to this:

"An appropriate punishment is provided, but you are not to be concerned in your closing or your conclusion with punishment."

Any objection to that?

Mr. Sullivan: No objection to that.

The Court: Instruction 2. The indictment has not been read: it has merely been sketched.

Mr. Sullivan: I will read it. I generally do so in a short indictment. [178]

The Court: All right.

"* * * both counts have been brought under the same statute just read to you.

The next sentence can go out. That sentence starts, "The statute pertains—" and so forth.

Mr. Neukom: Yes.

Mr. Sullivan: That goes out.

The Court: That goes out.

Now, if I summarize them I have to summarize all the elements of the offense, I think, which you have done under the first count, but under the second count you have not. In other words, I think it might be reversible error if I simply said, "The second count is substantially the same as the first except it charges the defendant did accept and did receive the bribe referred to in Count 1," because it must be accepted and received by him in his official capacity and so forth.

Mr. Neukom: Then, why can't you add—you can make them both brief by just saying the first count charges that on or about October 3rd, 1946—

The Court: Yes, a "bribe in the sum of \$100.00," and the second count that, "on or about October 3rd, 1946, he accepted and received \$100.00 from Tomsone, all contrary to the statute."

Mr. Sullivan: That is satisfactory. [179]

M. Neukom: That is all right.

The Court: "The first count charges that on or about October 3rd, 1946, the defendant asked for a bribe in the sum of \$100.00 from one Hubert Tomsone, and the second count charges that on or about October 18th, 1946, he received \$100.00 from Tomsone, all contrary to the statute."

Is that agreeable?

Mr. Sullivan: That is agreeable.

The Court: No. 3. Is there any objection to No. 3?

Mr. Sullivan: The objection that I have to No. 3 is that—

The Court: It is a little argumentative, I think.

Mr. Neukom: That is the language from the Fall case—the Whitney bribe case, but I will strike the second paragraph. The other part is absolutely the law.

The Court: I think that is the law.

Mr. Sullivan: The thing about that is that it seems to me it ought to be more specific—that is, asking and receiving was with the specific intent on the part of the defendant to influence his official conduct. In other words, for the purpose of influencing his official conduct. It seems that that leaves it open as to whether it might have been the purpose on the part of the giver.

The Court: I think that addition could and should be made: [180]

“For the purpose and with the intent on the part of the defendant.”

Mr. Sullivan: That is right.

The Court: Any objection?

Mr. Neukom: Adding that after “conduct”?

The Court: Yes:

“For the purpose and with the intent on the part of the defendant of influencing his official conduct.”

And then strike the last paragraph. Any objection?

Mr. Sullivan: I have no objection to the first paragraph and, while I am satisfied that the evidence in this case is going to establish the subject matter of the second paragraph, it still seems to me that that is a question of fact that should be decided by the jury and not one on which they should be instructed.

Mr. Neukom: I have no objection to taking it out.

The Court: Let the record show the last paragraph is stricken.

No. 4.

Mr. Neukom: You don't object to No. 4, do you?

Mr. Sullivan: No, I have no objection to No. 4.

The Court: No. 5.

Mr. Neukom: The next one does give your point.

Mr. Sullivan: That is right. [181]

The Court: I don't think they have to ascertain what his official duties were. That is too much.

Mr. Neukom: Well, I was just trying to—

The Court: They have to ascertain whether or not—

Mr. Neukom: He was an official—

The Court: Whether or not his official duties required or permitted him to control by order the number or quantity of shoes, orthopedic shoes. That is all there is evidence about—shoes.

Mr. Neukom: The law even goes further and it is covered by a later one. Even if he doesn't have final decision it comes within the purview of the statute and when you use the word "control"—

The Court: "have to ascertain whether or not his official duties required or permitted him to act in any way in connection with the number or quantity of shoes to be delivered by Tomsone under the contract."

Wouldn't that cover it?

Mr. Sullivan: I think it would.

Mr. Neukom: Yes, I think it would. I don't know where you are going to intersperse that.

The Court: That would be at lines 11 and 12. Instead of "next, you should ascertain from the evidence what the official duties of the defendant were * * *." In other [182] words they do not have to roam the whole category.

Mr. Neukom: Let us put it this way:

"by Hubert Orthopedic Service."

The Court: By Tomsone.

Mr. Neukom: By Tomsone. That replaces the second paragraph.

The Court: I will now read the paragraph as it is amended:

"Next, you should ascertain from the evidence whether or not his official duties required or permitted him to act in any way in connection with the number or quantity of shoes to be delivered by Tomsone under the contract. Each of these elements must be found to exist beyond a reasonable doubt."

Does that cover it?

Mr. Neukom: Yes.

The Court: Any objection?

Mr. Sullivan: No objection.

The Court: Any objection to the last paragraph?

Mr. Sullivan: I have no objection to that.

The Court: Now, No. 6. Just a moment, I want to add to Instruction No. 5 before the last paragraph—I think I already read it but I want to call it to your attention:

"Each of these elements must be found to exist beyond a reasonable doubt." [183]

Mr. Sullivan: That comes after the word "contract"?

The Court: Yes. Now, No. 6. That is something of a repetition.

Mr. Sullivan: I think that is covered.

Mr. Neukom: Strike it out.

The Court: That is No. 3, the gravamen.

Mr. Neukom: Yes.

The Court: Still I think part of this is pertinent.

Mr. Neukom: You have added something to these that I did not originally have.

The Court: I think this would be all right if we strike out on line 9:

“and whether such official duties encompassed matters

* * *

That is covered by the previous instruction.

Mr. Neukom: That is right.

The Court: So it will end with the word “indictment” on line 9, and stand as is. Any objection?

Mr. Sullivan: The only objection is, the first line: “After finding the matters as instructed * * *

The Court: All right, “If you find.”

Mr. Sullivan: I think that is better.

The Court: And instead of “as instructed,” we will substitute “as covered.” “If you find the matters as covered [184] in the preceding instructions, you should next ascertain * * *

and so forth.

Mr. Sullivan: That is right. I have no objection to that.

The Court: No. 7. The defendant is not making the defense that he only had the power to make recommendations to his superiors?

Mr. Sullivan: Oh, no, your Honor.

The Court: Then why should Instruction No. 7 be included?

Mr. Neukom: I didn't know precisely what he would argue here.

Mr. Sullivan: No, we are not going to contend that he only had the power to recommend to his superiors. Our

evidence will show that he had the right to issue the prescriptions for the shoes and the prescriptions were taken into the clerk's office and an order made upon his recommendation for the prescription.

Mr. Neukom: In other words, do you concede that as an official of the hospital his capacity was such that had he accepted this bribe to influence his decision that he was a person who had the power to make such recommendation?

Mr. Sullivan: That is right.

The Court: By asking "do you concede," do you mean to [185] concede that finally?

Mr. Neukom: No, I mean as an element on instructions. I don't want Mr. Sullivan to argue that this defendant was nothing out there—that he couldn't do anything.

Mr. Sullivan: Oh, no; absolutely not.

The Court: Then this instruction has no place.

Mr. Neukom: You don't know at the beginning what you are up against.

The Court: I know that. Next is No. 8. It reads to me like a defendant's instruction.

Mr. Neukom: It is the language of the Whitney case.

The Court: I don't like the language of that instruction.

"In order for you to find the defendant guilty" nor, do I like the language that is so usually thrown in, "you will then find the defendant guilty."

All of you fellows put the cracker on the end of your instructions.

Mr. Neukom: You can change that.

Mr. Sullivan: It doesn't seem to me that is a correct statement of the law. It seems to me as I read that instruction that if this was accepted:

“with intention to cause Tomson to believe he would get more consideration”—

Mr. Neukom: You read the Whitney case and you will find that is the rule. [186]

Mr. Sullivan: Whether it was the intent in the mind of the defendant to influence his official acts.

Mr. Neukom: It is an Osage Indian Agency case. I think it is in the latter part of it.

The Court: This was an attempted bribery.

Mr. Neukom: I may have gotten it from the Daniels case. I don't remember.

The Court: I think the thought here is good in this instruction, that it isn't necessary that his action be actually influenced.

Mr. Sullivan: That is correct.

The Court: If he intended that it would be influenced.

Mr. Sullivan: That is right. That is my understanding.

Mr. Neukom: That change is agreeable to me—if he intended the other person, the giver of the bribe to think that.

The Court: It is his intent. If he intended to get the money to influence his action it doesn't make any difference whether his action was influenced. That is to say, it doesn't make any difference whether he gave him more shoes or not.

Mr. Neukom: Whether he did wrong after that or not.

The Court: Whether he gave him more shoes or didn't.

Mr. Neukom: Where I got my point was another case, Judge.

The Court: Let us see if this isn't it. Beginning on [187] line 11, starting with the words:

"It is not necessary for you to find that the defendant's design or action was actually influenced by the asking or the receipt of a gratuity, but it is a violation of the statute if the defendant intended to have his official action influenced by a gratuity."

Mr. Sullivan: Yes.

The Court: That covers the point I think you intended to have by this instruction.

Mr. Neukom: What is the last there?

The Court: "if the defendant intended to have his official action influenced by a gratuity."

Mr. Neukom: I don't think that is the law because whether he intended it or not—

The Court: But the statute says: "receiving a gratuity, asking or receiving it with the intention that his official action shall be influenced thereby."

Now, that is the bribery. Otherwise it is just plain theft, larceny.

Mr. Neukom: You will give an instruction, of course, then on circumstantial evidence as to the element of intent and that it will be ascertained from all the facts?

The Court: Yes.

Mr. Neukom: I assume that is in your general instruction— [188] tions?

The Court: Yes.

Mr. Neukom: The one I mentioned was in the case of a juror.

Mr. Sullivan: That is a different situation where you bribe a juror, because it is with the intention to influence the action of the juror.

Mr. Neukom: I think you are right.

The Court: That was a special statute.

Mr. Neukom: There are two statutes on this that read almost identically.

The Court: And one relates to jurors.

Mr. Neukom: There was one in 91-1891, I believe, and then there is this one here. I don't see any difference in them. Will you read the last part of that again?

The Court: "official action influenced by a gratuity."

Mr. Neukom: That is all right.

The Court: No. 9. I will use "or received a gratuity" instead of "the gratuity." That is an element of fact that the jury must decide, whether it was a gratuity, and when I say "the gratuity" it carries the implication that I have decided it was a gratuity.

Mr. Neukom: Yes. Since you have changed the other one I think this is a fair instruction.

The Court: Yes, I think so. [189]

Mr. Sullivan: No objection.

The Court: No. 10. I think is repetitious. I cannot see the purpose of it.

Mr. Neukom: Well, there is only one thing that he could be found guilty of—one count and not guilty on another. This is one of those compound statutes where it says, "asked, received or accepted."

The Court: Well, you should have an instruction here, and I always give one whether requested or not, that they can find him guilty on both counts or not guilty on one and guilty on the other, or not guilty on all counts, and that covers that.

Mr. Neukom: That is right.

The Court: Without wrapping it all up in a ball of wax so that the jury doesn't know what you are talking about.

Instruction No. 11. I think that is the law.

Mr. Sullivan: I have no objection to it.

The Court: No. 12.

Mr. Neukom: He submitted one on entrapment, so let us compare them. I think his No. 17, his last one. I am going to suggest that you strike, if you use nine, that you strike my second paragraph.

The Court: Well, here is an instruction I gave on entrapment:

“The defendant has raised the defense of entrap- [190] ment to counts 3 and 4. By raising such defense he does not admit the acts charged but such acts must be proved to your satisfaction beyond a reasonable doubt from the evidence in the case and under these instructions. If, however, you so find that he committed such acts as charged then you must consider whether or not he was entrapped into committing them. As to entrapment, it has been defined by the Supreme Court as follows:

“ ‘The first duty of the officers of the law is to prevent and not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing. It must not be their endeavor to cause or to create crime in order to punish, and it is unconscionably contrary to the public policy and to the established law of the land to punish a man for the commission of an offense the like of which he would never be guilty, either in thought or deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it.

“ ‘Decoys may be used to entrap criminals and to present opportunity to one intending or willing to commit a crime, but decoys are not permissible to [191] ensnare the innocent and law-abiding into the commission of crime.

When the criminal design originates not with the accused but is conceived in the minds of the Government officers and the accused is, by persuasion, deceitful representation or inducement, lured into the commission of a criminal act the Government is estopped from sound public policy in the prosecution thereof.'

"So that if you should find that there was such entrapment then the defendant is entitled to your verdict of not guilty even though you find beyond a reasonable doubt that he did the acts alleged."

Mr. Sullivan: That is satisfactory.

The Court: Any objection?

Mr. Sullivan: There is no objection to that.

The Court: I think the Government's Instruction No. 12 is faulty. In the first paragraph it says:

"You are instructed that the very heart of the doctrine of entrapment is that the Government itself must have brought about the crime."

Then if you will read my second paragraph I think you will find it is a more fair interpretation of the law of entrapment, because that law is well established.

Mr. Neukom: And it is well established in innumerable [192] cases that the Government has a right to set decoys; that it is their duty to test a person who has originated the criminal intent and give him an opportunity to perpetrate the crime.

The Court: It is pretty hard to persuade me as against the Supreme Court, Mr. Neukom.

Mr. Neukom: Why can't you add to that:

"But if the criminal intent originated in the mind of the accused and he is merely afforded the opportunity of doing what he intended to do then it is not entrapment."

Mr. Sullivan: I think the court's instruction covers that.

Mr. Neukom: The instruction does not cover it. That is a discussion and not an instruction. That is a discussion of a point of law.

The Court: It has all the elements of entrapment.

Mr. Neukom: I don't think they are fairly stated from an instruction point of view. If you just add one sentence, the converse of that—the converse of what you just read—

The Court: Conversely, "If the criminal design originates in the mind of the accused then there is no entrapment."

Mr. Sullivan: I have no objection.

The Court: I will add that before saying, "So if you [193] find there was such entrapment—" and so forth.

Mr. Neukom: That is satisfactory. And that eliminates your 17, doesn't it?

Mr. Sullivan: Yes, that eliminates 17 from mine, absolutely.

The Court: All right, the defendant's requested instructions.

Mr. Neukom: The first one is the indictment. I assume that is covered.

The Court: I cover that in my general instructions.

Mr. Neukom: And No. 2 I am confident is covered.

The Court: I will give No. 4.

Mr. Neukom: I have no objection to it.

The Court: I will give No. 4.

Mr. Neukom: Except that is going to give rise to the theory of an accomplice and I haven't an instruction on it.

Mr. Sullivan: Frankly, that may not be necessary to even give, Judge. When I prepared these I did not know how the evidence would show up here.

The Court: Do you want No. 4 or not?

Mr. Sullivan: I don't think it is necessary to give it.

The Court: All right.

Mr. Neukom: I have no objection to No. 5.

Mr. Sullivan: Six is in your general instructions. [194]

The Court: Yes, I will take that out. I have that but I want to check and be sure. Experts.

Mr. Sullivan: Well, I thought that might have some bearing.

The Court: Are you going to have experts?

Mr. Sullivan: Well, I think that there is some question here as to whether or not—I mean under the evidence in this case whether he acted honestly in his opinion as a doctor and so forth.

Mr. Neukom: I can't see that unless there is some unusual or different evidence coming in this case.

The Court: Unless you have experts that you are going to put on the stand I can see no need for this instruction in the present state of the evidence.

Mr. Sullivan: Then suppose we hold it in abeyance and see whether or not—

The Court: Do you expect to put experts on?

Mr. Sullivan: I have some doctors subpoenaed.

The Court: Character witnesses?

Mr. Sullivan: Well, not just alone for character but in connection with their opinion regarding his diagnoses.

Mr. Neukom: I don't even see where that is material in the case. There has been no evidence by the Government to contest his—

The Court: Under my instructions what difference would [195] it make?

Mr. Sullivan: All right.

The Court: Whether his diagnoses were correct or not. It doesn't make any difference whether he did give the fellow the shoes who was entitled to them if he intended to be influenced by taking money.

Mr. Sullivan: That would be true, Judge, except there is evidence here in this case now by Tomsone that after Dr. Gage came to work there, between the time that he came to work there and the second occasion when Tomsone saw him that his orders had decreased and that between that time and the 3rd of October there had been a further decrease in his orders.

Now, then, it seems to me that it would become material from the defendant's standpoint to show that.

The Court: Yes.

Mr. Sullivan: That any refusals that he made were refusals that were honest and his honest opinion as an orthopedic surgeon.

The Court: Under those circumstances I think it would be admissible.

Mr. Neukom: You will give No. 7?

The Court: Yes.

Mr. Neukom: 8 is covered, I think.

The Court: Yes; and 9 is covered.

Mr. Sullivan: 10 is. [196]

Mr. Neukom: That is a correct statement but I am sure it is covered.

The Court: Yes, I am sure it is.

Mr. Sullivan: I think it is.

The Court: And 11 is a re-statement of 10.

Mr. Sullivan: Just about.

The Court: 12. I have covered intent.

Mr. Sullivan: Yes, I think you have covered intent very well in the other instructions and I think as far as my next instruction—

Mr. Neukom: 13.

Mr. Sullivan: —you have adequately covered that.

Mr. Neukom: 13?

Mr. Sullivan: Yes. I don't know whether you got 14 there in your general instructions or not.

Mr. Neukom: I think that works both ways. If we are going to give that one I think we ought to give the 1861 subdivision 15 of the Code of Civil Procedures, that official conduct is presumed to be legal and proper. I have that with respect to your illusion as to the contract here. I think that works both ways in this case. It is one of the rebuttable presumptions that official duty has been regularly performed. I think it confuses the whole thing—all of this does.

The Court: Yes, I think so. This is just a presumption [197] of innocence.

Mr. Sullivan: Yes, that is.

The Court: That is all this is, it is just an elaboration upon the doctrine of presumption of innocence.

Mr. Sullivan: That is exactly what it is.

The Court: I think it might become confusing because the defendant is presumed to be innocent, not only as to motives, but as to acts—to everything, and this merely directs attention to his motive.

Mr. Sullivan: All right.

The Court: I will decline it.

15 and 16. 16 is again another presumption of innocence and 17 is your entrapment.

Mr. Sullivan: That is right.

The Court: O.K.

Mr. Neukom: Now, I do not have an instruction here on an accomplice. I do not believe that the evidence shows Tomsone is an accomplice but I think the law gives us a right to ask for that instruction.

The Court: He has not asked for it.

Mr. Sullivan: I did not ask for it.

The Court: If you want it, I have one here.

Mr. Neukom: You must find preliminarily that Tomsone is an accomplice.

The Court: Yes. [198]

Mr. Neukom: But I think before the instruction should be given—I think as the evidence stands now there is no evidence—

The Court: The instruction here is:

“The testimony of an accomplice is not to be judged by you by the same standards as that of other witnesses, and the witnesses Harold Garrison is an accomplice.”

Mr. Neukom: He had co-complicity probably—had criminal intent and probably gave State’s evidence, didn’t he?

The Court: Yes.

Mr. Neukom: There is no evidence here to indicate that Tomsone—

The Court: Was an accomplice.

Mr. Neukom: So I do not think the instruction is proper.

The Court: All right, the instructions will be given as indicated.

(The following proceedings were had in open court in the presence of the jury:)

The Court: The usual stipulation, gentlemen?

Mr. Sullivan: Yes, your Honor.

Mr. Neukom: Yes.

The Court: The defendant, I believe, was on the stand.

Mr. Sullivan: Yes, your Honor. Will you resume the [199] stand?

THEODORE S. GAGE,

called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Sullivan:

Q. Now, if I remember correctly, Doctor, at the time of the adjournment yesterday afternoon we were—I had either just asked you or you just told us who your immediate superior was at the Veterans Administration in Sawtelle. Had you testified as to your immediate superior?

A. Yes, I had.

Q. That was Dr. Long?

A. That was Dr. Long and Colonel Strachan.

Q. Now, in connection with your work at the hospital there in Sawtelle, did certain patients or veterans come to you for examination and treatment in relation to their feet?

A. Yes, they did.

Q. And in connection with your work there did it become necessary for you from time to time to order specially built orthopedic or corrective shoes?

A. That is correct, it did.

(Testimony of Theodore S. Gage)

Q. And what was your procedure in relation to ordering shoes for a veteran when you deemed it necessary to do so? [200]

A. First the patient was examined thoroughly and his complaints written in the folders supplied—

The Court: Didn't we go through that yesterday?

Mr. Sullivan: I think we did.

The Court: I think we went through that yesterday. He put it on his outgoing file on the desk and it was taken by the clerk.

Mr. Neukom: The subject matter that you were on was about the contract. You were about to get to his inspection of the contract when we adjourned.

Mr. Sullivan: All right.

Q. You did learn, I believe you testified, that there was a contract in existence between Mr. Hubert Tomsone and the Veterans Administration there for the purpose of furnishing these shoes? A. That is correct, I did.

Q. And when it became necessary for you to write a prescription for shoes was an order given to Hubert Tomsone for those shoes?

A. It was given but not by me.

Q. How was the order written up?

A. Well, the order was given in through the process of being taken off of the patient's record where the prescription had originally been written and had been written in a code manner to conform to the code numbers on the contract. [201] Then the clerk in the orthopedic clerical office would write up the initial purchase order from that particular prescription in the patient's chart.

(Testimony of Theodore S. Gage)

Q. Now, then, did you come to know, after you went to work there, did you come to know Mr. Hubert Tomsone?
A. Yes.

Q. Now, when did you first meet Mr. Tomsone?

A. My first meeting with Mr. Tomsone was some time early in September, shortly after Labor Day, I believe.

Q. And between the time that you first went to work there and the time that you first met Mr. Tomsone had you had any complaints from any of the veterans in relation to the shoes or modified shoes that had been made by Mr. Tomsone?

A. Yes, I had a number of them.

Q. Now, on the occasion of your first meeting Mr. Tomsone did you have any conversation with him in relation to the type of work that he was doing?

A. Yes, I did.

Q. Now, just relate to the jury what was said on that occasion by yourself or by Mr. Tomsone—incidentally, was there anyone else present besides the two of you?

A. Yes. At that particular meeting there was someone else present.

Q. Who else was present?

A. Dr. Mosay (?). [202]

Q. Just relate what was said.

A. May I go back two weeks prior to that meeting?

The Court: I think your counsel had better direct the testimony.

The Witness: At the first meeting with Mr. Tomsone I asked that he come into my office, that I had something I wanted to talk to him about.

The Court: Is this the meeting that you identified now with Dr. somebody else present?

The Witness: Yes, sir.

(Testimony of Theodore S. Gage)

The Court: All right.

The Witness: At that meeting Dr. Mosay was present in my office. Mr. Tomsone entered my office in the presence of Dr. Mosay and I told him that during the weeks that he had been on his vacation—that this was the first time that I had met him and I was a new man at the Facility; that things were new to me and that I wanted to make his acquaintance and wanted him to know me but that during the weeks that he was away on his vacation I had had a number of complaints from veterans regarding improper fits in shoes and improper modifications of their own shoes, and I asked him about it, and one word led to another. He got quite hot about it, and I got quite hot, and the conversation developed from an ordinary conversation into an argument, during which time I don't believe either one of us acted much like a gentleman. [203] We used language that was perhaps not proper and it was at that particular occasion when I asked Mr. Tomsone to refrain from calling me "Gage", that my name was Dr. Gage, and it was also at that time that he said, "My name is Mr. Tomsone. Call me Mr. Tomsone."

Well, the argument lasted perhaps 10 or 15 minutes and I told him during that time that since I was the new man here there were certain things that I was going to see were enforced and certain stipulations in the contract that he held that called for certain definite specifications in shoes that had to be lived up to.

I also told him that when a prescription was written by a doctor that he was not to substitute or to change that prescription in any way according to the way he felt that it should be—that that was the doctor's prerogative to do the prescribing and that was the way I expected him to turn out the shoes.

(Testimony of Theodore S. Gage)

His argument was that the contract did not have certain stipulations or certain items in the contract that met with some of the prescriptions, which was true. The contract was not a properly written orthopedic contract.

Q. By Mr. Sullivan: And did you tell him—

Mr. Neukom: Wait just a moment, your Honor. I object to the conclusion of this witness as to the contract. I think the jury should be instructed to disregard it. [204]

The Court: The jury is instructed to disregard the last statement, that it was not a properly written contract, orthopedic contract. That may be stricken from the record.

Q. By Mr. Sullivan: Go on with your conversation with Mr. Tomsone.

A. Well, that was the substance of that particular first meeting and argument with Mr. Tomsone.

Q. Now, when did you next see Mr. Tomsone?

A. I saw Mr. Tomsone several days later in the corridor outside of my office.

Q. Did you have a conversation with him at that time?

A. Yes, I did. I went up to him and I said, "Tom, I am sorry that I acted in the manner in which I did. It wasn't very gentlemanly-like. I suppose I lost my head," and he said, "Well, I suppose I lost my head."

Then the conversation out in the corridor continued for a few minutes longer, at which time he said to me, "How come my business is dropping off? Why are you not writing more prescriptions for shoes?"

I said I wasn't aware that it was dropping off; that there were certain types of cases that were coming in that the need for special orthopedic shoes did not exist and they had been received—they previously had received them and that I was just denying them on the basis that no

(Testimony of Theodore S. Gage)

medical indication existed for their need; that an ordinary pair of [205] shoes would have done just as well as one of the expensive pairs of shoes that Mr. Tomsone made.

Q. Now, did you have at your disposal there at the Veterans Administration and for your guidance the contract between the Veterans Administration and Mr. Tomsone? A. Yes, I did.

Q. And did you have occasion from time to time while you were employed as an orthopedic surgeon at the Veterans Administration there to inspect the work that had been made by Mr. Tomsone under prescriptions that had been issued by the orthopedic department?

A. Yes, I did.

Q. And did you have occasion to ascertain whether or not the work which was done by Mr. Tomsone met the specifications contained in the contract which he had with the Government?

Mr. Neukom: Just a moment. I object to that as being too indefinite and too general and calling for the conclusion of the witness on a matter on which we are not able to respond unless we know what the specific item is in mind.

The Court: Sustained.

Q. By Mr. Sullivan: Well, did you ever have occasion to inspect any orthopedic shoes that were made by Mr. Tomsone under a prescription issued by the Veterans Administration in Sawtelle? [206] A. Yes, I did.

Q. And under the contract which existed between Mr. Tomsone and the Veterans Administration did the orthopedic shoes have to meet certain specifications?

A. Yes, they did.

(Testimony of Theodore S. Gage)

Q. Now, did you have occasion to determine upon your examination of any orthopedic shoes made by Mr. Tomsone whether or not those shoes met the specifications contained in the contract with the Veterans Administration?

Mr. Neukom: I raise the same objection—the same objections is proper but I am going to withdraw it in the interests of time, your Honor.

The Witness: Yes, I had the occasion to inspect them and they did not meet the specifications.

Q. By Mr. Sullivan: Can you tell the jury wherein they failed to meet the specifications?

A. The contract called for prime leather and the shoes that I saw were not of prime leather. The specifications of the contract called for certain steel shanks in each shoe and many, many shoes did not have steel shanks.

The contract called for hand-sewed shoes and there was machine-sewed shoes. Those that were hand-sewed were haphazardly sewn, so that the seam between the welt and the upper part of the shoe many times broke through upon the initial first couple of wearings of the shoe by the patient. [207]

Q. Did you from time to time have occasion to call those matters to the attention of Mr. Tomsone?

A. I did.

Q. Now, were you acquainted with Mr. Howe, who was also connected with the Veterans Administration there?

A. I was.

Q. And did you ever have occasion to discuss the matter of the manner in which Mr. Tomsone was fulfilling this contract with Mr. Howe?

A. I did, sir.

Q. Without going into the conversation itself, did you ever call to the attention of Mr. Howe the fact that Mr.

(Testimony of Theodore S. Gage)

Tomsone was not making his shoes according to the specifications contained in the contract?

A. I did on two occasions.

Q. Now, did you ever have any discussion with Mr. Howe in relation to the orthopedic contract which existed between Mr. Tomsone and the Veterans Administration?

A. I did.

Q. And do you know approximately when that was, Doctor?

A. Sometime in September—perhaps the early part of September. I do not remember the exact dates. I talked to him on the telephone on those two occasions that I mentioned.

Q. Just relate to the jury the conversation that took [208] place between yourself and Mr. Howe on that occasion.

A. I called Mr. Howe on those two occasions and called his attention to the specifications of the contract and some of the complaints that had been coming in from the Veterans that violated the definite specifications in the contract, and I said to him that my observation in using the contract that was at my disposal in the office, that the contract did not seem to be a properly drawn-up orthopedic contract; that there were several basic orthopedic corrections to shoes that were not on the contract whatsoever that an orthopedic man, an experienced orthopedic man would have put on a contract. Mr. Howe said that he knew that the contract lacked many of those refinements; that it had been made up by a civilian and not by a doctor. And on one of those occasions, I don't remember which one, the first or second, he asked me if I had the time would I sit down and re-write the contract—as I thought

(Testimony of Theodore S. Gage)

an orthopedic contract should be written, and submit it to him and he would go over it, and if he found that this man, Mr. Tomsone, was not living up to the specifications he would invoke the first clause of the contract, cancellation clause of 30 days and then advertise, open up for new bids on the contract.

Q. Well, now, after having had that conversation with Mr. Howe, did you have any conversation with Mr. Tomsone in relation to your re-writing the contract—I mean, with [209] Mr. Tomsone?

A. Yes. There were a number of occasions when I told him that the contract was not proper and that I had been asked to re-write it.

Q. Did you tell him who had asked you to re-write it?

A. Not on those occasions.

The Court: We will take a short recess now for the purpose of changing reporters.

(Short recess.) [210]

The Court: Proceed.

By Mr. Sullivan:

Q. Now, Dr. Gage, did you ever have a conversation with Mr. Tomsone in which you stated to him, or asked him in substance and effect, how was business, and he replied, "Business is good," to which you replied, "I don't think so, I know there has to be another change here and there have been a lot of veterans getting shoes who are not entitled to them"? A. No, sir; I did not.

Q. Did you ever have a conversation with Mr. Tomsone in which you told him, in substance and effect, "I want to talk to you about something. I have been rejected by

(Testimony of Theodore S. Gage)

the medical board twice and I am not here for my health. I have to make some money somehow”?

A. I did not; at no time.

Q. Did you ever have a conversation with Mr. Tomsone in which you told him, in substance and effect, that if he played ball with you that you could see that he made a lot of money, or had a lot more business?

A. No, I never made such a conversation or had such a conversation with Mr. Tomsone.

Q. Did you ever have a conversation with Mr. Tomsone in which you told him, in substance and effect, that he was selfish, that there were a lot of people who made money on the outside and a lot of physicians who got money or other [211] monthly presents from persons or companies that they ordered things from?

A. I had no such conversation with him.

Q. Other than discussing with Mr. Howe at the Veterans Administration there the manner in which Mr. Tomsone was fulfilling this contract, did you make any complaint to any other person out there about it?

A. Yes, I did.

Q. Who else did you complain to?

A. I complained to my superior, Dr. Long, on a number of occasions.

Q. Did you complain to any of the other doctors around there about him?

A. Yes, I was quite hot about it and mentioned it to my colleagues out there. Most of them had heard me say that.

Q. Can you tell us who some of the other doctors were that you made such complaints to?

A. My colleagues there, Dr. Levine, Dr. Kuhn, Dr. Strachan, Dr. John Nie—those who were closely associated

(Testimony of Theodore S. Gage)

with me in the department and those that were in the outpatient service had heard me on many occasions.

Q. Now was there any occasion when you gave to Mr. Tomsone your home address?

A. Yes, there was.

Mr. Sullivan: Mr. Clerk, I wonder if I might have that [212] exhibit, please.

(The document referred to was passed to counsel.)

By Mr. Sullivan:

Q. Referring, Dr. Gage, to Government's Exhibit No. 6, is that exhibit in your handwriting?

A. Yes, it is.

Q. Does that exhibit contain your address in Santa Monica? A. That is correct.

Q. To whom did you give this written memorandum, Government's Exhibit No. 6, containing your address?

A. To Mr. Tomsone.

Q. Did you have some conversation with him at that time in relation to giving him your address?

A. Yes, I did.

Q. Just relate to the jury what occurred between yourself and Mr. Tomsone at that time, what was said by each of you to the other.

A. On that particular instance, it followed shortly after that little spat that Mr. Tomsone had with me and shortly after the occasion when I apologized to him in the hall. He came to me and tried to be friendly, and in a conversation on this occasion he said, "Well, you look like you could enjoy some good food," and I said, "Yes, I do."

He said, "How would you like a good spaghetti dinner?" [213]

(Testimony of Theodore S. Gage)

I said, "It sounds all right. Who do you know makes good spaghetti in this town?"

He said, "I would like to take you and Mrs. Gage out to dinner one night."

I said, "That is all right with me."

He said, "Where do you live?" And I wrote that particular note with my address and phone number and told him that any time he decided if he wanted to get in touch with me at the hospital or at my home he could do so.

Q. Well, now, on the occasion when you gave him that slip of paper with your address on it, did you have any conversation with him in substance and effect in which you told him to come down to your apartment sometime and talk to you about this matter of both of you making some money?

A. No, sir, I never had any such conversation.

Q. Did you ever have any conversation with him in which he told you in substance—in which you told him in substance and effect, that he ought to give this contract up and then you would try and get the contract under some fictitious name and use him as a silent partner, that you would do all the work on the inside and he could make the shoes on the outside and you could both make a lot of money?

A. I did not have any such conversation.

Q. Did you ever see Mr. Tomson at your home?

A. No, I did not. He was never at my home. [214]

Q. Now you say that you gave him this slip of paper with your address on sometime shortly after you had had this first argument with him, is that correct?

A. That is correct.

(Testimony of Theodore S. Gage)

Q. And would that be sometime in the early part of September, about the middle of September?

A. Approximately thereabouts. It would be between the 10th and the 15th perhaps.

Q. Did you ever have occasion to go to Mr. Tomsone's place of business where he made his shoes?

A. Yes, I went there on two occasions.

Q. Do you know approximately when that was?

A. It was in the latter part of September. I had taken four days leave off of my annual leave from the hospital to take care of some of my own personal business, and I believe it began on either the 24th or 25th of September and ran until Friday morning the 29th. I believe those are the dates.

On the 27th I was downtown and I was in the vicinity of Mr. Tomsone's shop. I stopped in there to see what type of a shop he had and just how he was turning out his products. He was not there at the time. I waited a few moments and he came in, and I remained there approximately an hour, during which time he showed me various types of arch supports, various types of shoes and corrections that he was making.

Q. Did you ever go back to his place of business after [215] that?

A. Yes, I did.

Q. When did you go back there?

A. I went back the next day.

Q. When you went back the next day did anyone go with you?

A. Mrs. Gage accompanied me the next day.

(Testimony of Theodore S. Gage)

Q. When Mrs. Gage accompanied you the next day what, if anything, did you do there at Mr. Tomsone's place?

A. Well, on the day previous while I was there I mentioned to Mr. Tomsone that Mrs. Gage had some very bad arthritic feet and she was somewhat crimped up in walking, that I had tried most everything and I had an idea on correcting her shoes, and asked him if he would do it under my supervision. And he said, "Yes. Bring her down."

So the next day I brought her in. During that visit I made some plaster molds of her feet and showed him how I wanted her shoes, the ones she wore in, modified. And under my supervision Mr. Tomsone made the correction and we left his shop.

Q. How long were you there on each occasion?

A. About an hour and a half.

Q. Were her shoes modified while you were there at that time? A. Yes. [216]

Q. On that occasion did you personally supervise the modification of her shoes in his shop? A. I did.

Q. Now that was, you say, in September, the latter part of September?

A. The latter part of September. It was the day, just the last day of my 4-day leave from the hospital. I returned to work the next day.

Q. Was that the first time that Mr. Tomsone had ever met Mrs. Gage?

A. That was the first time he had ever met Mrs. Gage.

Q. Now was there ever any occasion when Mr. Tomsone called you and wanted you to go to lunch with him? A. Yes, there was.

(Testimony of Theodore S. Gage)

Q. Do you recall approximately when that was?

A. That was in the early part of October, I imagine the 2nd or 3rd, somewhere thereabouts.

Q. How did he communicate with you, by telephone?

A. He called me by telephone.

Q. Incidentally, at the Veterans Administration out there in Sawtelle do you have your own office where you examine your patients?

A. I have my own office there.

Q. And do you have a telephone in your own office there? [217]

A. No, I have no telephone in my own office.

Q. When you receive any calls there by phone, where do you have to take those calls?

A. Well, I have to run down to the end of the hall to either Dr. Long's section office or to the orthopedic clerical office.

Q. In the orthopedic clerical office, how many employees are in that office?

A. Oh, there is always two or three in that office.

Q. Do you recall on the occasion when you received the phone call from Mr. Tomsone wherein you were invited to go to lunch with him, on what phone did you take that call?

A. One of the girls of the orthopedic clerical office called me that there was a telephone call in her office, and I went to her office.

Q. On that occasion what was said by Mr. Tomsone over the telephone, and what did you tell him?

A. He asked me if I would have lunch with him that afternoon, that he wanted to talk to me, and I said, "Yes, I am just about ready to go to lunch. Where are you at?"

(Testimony of Theodore S. Gage)

He said, "I am not far from the place."

I said, "Where will I meet you?"

He said, "Meet me at Wilshire and Sawtelle. I will be parked out in front of the place."

I said, "All right. I will meet you there." [218]

Q. Was anything said about the time that you were to meet him?

A. The telephone call was approximately a couple of minutes before 12:00, and my lunch hour began at 12:00, and I told him I was just about ready to go to lunch and I would meet him there in a few minutes.

Q. Did Mr. Tomsone tell you at that time over the telephone that he couldn't meet you at your home?

A. No, he did not.

Q. Did you meet him at that intersection in response to that phone call?

A. Yes. I walked out to the intersection of Wilshire and Sawtelle and Mr. Tomsone was sitting in the car.

Q. That, as I understand your testimony, was sometime the early part of October? A. That is correct.

Q. Now prior to that occasion, had there ever been any conversation between yourself and Mr. Tomsone regarding money? A. There had not.

Q. When you met, where if any place did you and Mr. Tomsone go? A. It was always in my office or—

Q. I mean, on this occasion when you met him in the car.

A. Well, I got in his car and he started in the direction of [219] Westwood Village, and we had just about reached Sepulveda and Wilshire Boulevard and he said, "Where would you like to have lunch?"

I said, "It makes no difference."

(Testimony of Theodore S. Gage)

"Well," he said, "you live out this way and you eat lunch out here often. Where would you want to go?"

I said, "Well, there is nothing in Westwood Village that is nice. Let's go to the Mayfair."

And he turned the car around and we proceeded to the Mayfair Restaurant in Santa Monica.

Q. Did you have some conversation with him while you were at the Mayfair? A. Yes.

Q. Incidentally, did you both occupy, that is, the two of you occupy, a table alone?

A. Yes, we occupied a table alone.

Q. Just relate to the jury what was said by Mr. Tomsone and by you while you were having lunch there.

A. Mr. Tomsone said to me, "I don't understand why you are cutting down my business."

I said, "There is nothing personal. I am not cutting down your business intentionally."

He said, "You are a smart fellow. You can make some money. How much do you make?"

I said, "It is a matter of record. I am a public ser- [220] vant. You can find that out."

He said, "What do you make?"

I said, "I make about \$100 a week." That was the entire conversation.

Q. Did he then take you back to the hospital?

A. Yes, we left. I only had an hour for lunch and by the time we got there it was 12:30 and on Government time if you are one minute off you are late.

Q. Then did you thereafter have any conversation with Mr. Tomsone in relation to money?

A. No, sir.

Q. Never at any time? A. Never at any time.

(Testimony of Theodore S. Gage)

Q. Did he ever at any time say anything to you about giving you a check? A. Yes.

Q. When was that, Doctor?

A. That was somewhere towards the middle of October. He came into my office and bent over my desk and said, "Look, I want to give you some money. I will give you a check."

I said, "What for?"

"Well," he said, "you can use some money."

I said, "Look, don't be foolish."

He said, "Take a check," and he threw his checkbook on the desk, and I walked out of the office there on some other [221] business and that ended that particular incident.

Q. Had you ever said anything about either one of those incidents to anybody out at the Veterans Administration out there?

A. I had made complaints to Dr. Long and shortly before that I had a conversation with Mr. Chapman along these lines.

Q. Which one did you talk to first, Dr. Long or Mr. Chapman? A. I talked to Dr. Long.

Q. Do you know approximately when you first talked to Dr. Long about that?

A. Well, it was sometime in September, shortly after the argument that I had with Mr. Tomsone. I told Dr. Long that I wasn't satisfied with his work and that he was making sort of overtures and I couldn't understand what it was, and there wasn't anything more.

(Testimony of Theodore S. Gage)

Q. When did you talk to Mr. Chapman about it, approximately?

A. Approximately the 5th of October. I saw Mr. Chapman in his office.

Q. What was the occasion of your seeing Mr. Chapman?

A. Relative to my resignation from the Facility.

Q. Had you come to any decision with respect to whether you wanted to stay on there or intended to resign prior to the time you talked to Mr. Chapman? [222]

A. I had on a number of occasions shortly after I began work there found I wasn't very happy and had threatened to resign a number of times, but didn't actually go through the official channels until somewhere towards the end of September when I asked Mr. Nie, the medical administrative office, or rather one of the girls in his office, to draw up my resignation papers.

Q. Did you cause your resignation papers to be drawn up?

A. Yes.

Mr. Neukom: I object to its materiality, unless it is for the purpose of showing that he wasn't employed at the time in question.

Mr. Sullivan: I don't intend to show he wasn't employed at the time in question.

Mr. Neukom: Then I still object, your Honor. It is utterly immaterial whether he was going to resign or not resign or what his intent was as to that. That doesn't settle any of the issues in this case.

The Court: Overruled.

Mr. Sullivan: May this be marked Defendant's exhibit for identification?

The Court: That is the first one?

(Testimony of Theodore S. Gage)

Mr. Sullivan: Yes.

The Court: Defendant's Exhibit A. [223]

(The document referred to was marked Defendant's Exhibit A for identification.)

By Mr. Sullivan:

Q. Now, Dr. Gage, I show you Defendant's Exhibit A, which purports to be a request for resignation. Do you recognize that document? A. Yes, I do, sir.

Q. Can you tell the jury what that is?

A. Well, it is a personnel action request for resignation of one Theodore S. Gage, the date of the request October 2, 1946, and the effective desired date of resignation October 15th.

Q. Did you procure that exhibit, Defendant's Exhibit A, on or about October 2, 1946?

A. I made the request, I think it was about the 30th of September, somewhere thereabouts, and these papers were handed to me on that particular date, on October 2nd.

Q. Now at the time that you received this instrument, Defendant's Exhibit A, did you have any conversation with Mr. Arthur Nie at the Veterans Administration?

A. Yes, I did.

Q. Do you know in what capacity Mr. Arthur Nie was employed there?

A. Mr. Arthur Nie was the medical administrative officer, a new post that acted as a liaison between the adminis- [224] tration and the professional side of the outpatient department.

Q. When you procured that document, was it your intention to tender your resignation as an orthopedic surgeon at the Veterans Administration? A. Yes.

(Testimony of Theodore S. Gage)

Q. When did you have some discussion with Mr. Nie in relation to that?

A. I think it was the day he handed me these papers on October 2nd, and Mr. Nie said to me, "Personally," he said, "Doctor, I hate to see you leave. You are doing a good job. You have been working hard here and I know that you have been dissatisfied. Of course you might be a little impatient, impetuous, but," he said, "you are doing a good job and personally I would like you to reconsider and stay. But I would suggest, as a suggestion, since Mr. Chapman, the manager, has an open-door policy, why not go over and talk with him and air all your complaints to him. Tell him the things that are bothering you and your reasons why you want to resign."

Q. Following that conversation with Mr. Nie did you have some discussion with Mr. Chapman?

A. I did.

Q. When did you talk the matter over with Mr. Chapman? A. October 5, 1946.

Q. Just relate to the jury what was said by yourself [225] and by Mr. Chapman on that occasion.

A. I went to Mr. Chapman's office, which is in the regional office on Sepulveda away from our particular office—we are in the hospital proper; the regional office was on the other side of Sepulveda—I went to Mr. Chapman's office and took with me a lot of papers, took my resignation and a copy of my reasons for resigning, the reasons that I had to put on the back of this form in order to make this official.

I spoke to Mr. Chapman. He granted me the interview and was very generous with his time. I explained to him that there was nothing personal in any of my actions, that

(Testimony of Theodore S. Gage)

I was dissatisfied with the way things were going and the type of medicine that I had to practice, the complaints that I was getting and the dry-rot that seemed to exist in that particular outpatient department.

I mentioned to him that I had gone to Dr. Long on a number of occasions with these complaints about the shoes, about artificial limbs, artificial legs, and Dr. Long shrugged his shoulders and didn't seem to be interested or do much about it.

I further elaborated on my four reasons for wanting to resign and leave the position. At the end of the conversation, or during the conversation, Mr. Chapman said to me—I am quoting; I don't know whether it had any significance at that time but he brought out—"I only hope that these [226] things that you tell me are not a carry-over from a scandal that we had here some years ago in which a doctor committed suicide." I don't know what that referred to and it was passed by.

Then I said to him, in conclusion, "Well, Mr. Chapman, these are my intentions. I wish to resign. What do you advise me to do?"

He said to me, "Well, I can't advise you if your mind is made up definitely, but in order to give me a chance to look into some of these things why don't you hold up your resignation until you hear from me?"

Q. Did you tell him what you would do in relation to your resignation after he requested you to hold it up?

A. I told him then that I would do that.

Q. That you would hold it up?

A. That I would hold it up.

(Testimony of Theodore S. Gage)

Q. Did you thereafter file your written request for resignation or did you hold it?

A. Well, I came back from the interview with Mr. Chapman and came into Mr. Arthur Nie's office and told him that I had had this meeting with Mr. Chapman and that I was very favorably impressed, that for the first time somebody seemed to be interested, and that on his recommendation that I hold up my resignation until he had a chance to investigate some of these complaints, that I was holding up my resignation. [227]

Q. Now, then, did you see Mr. Tomsone again after this occasion when you had lunch with him at the Mayfair, which was in the early part of October? A. Yes.

Q. When did you next see him after that, do you recall?

A. Well, I don't recall the exact date but I had occasion in the general routine of my work there on the days that he came into the clinic on Tuesdays and Fridays to see him after that meeting.

Q. Well, now, going back for just a moment to this occasion when you went to the Mayfair with Mr. Tomsone, did you tell Mr. Tomsone on that occasion, in substance and effect, that you wanted to have \$100 out of this contract? A. I did not.

Q. And did he on that occasion ask you, "What do you mean, \$100 a month?" And you said, "Hell, no, \$100 a week." A. There was no such conversation.

Q. Did you tell Mr. Tomsone on that occasion that you were going to resign on the 15th of October but that you would not resign if he would pay you \$100 a week out of the money he receiver on this contract?

A. I did not.

(Testimony of Theodore S. Gage)

Q. Didn't you tell him on that occasion, or say to him in substance and effect, "From now on you will see a difference in the orders in shoes starting today"? [228]

A. I did not say that.

Q. Now did you, the Friday following the occasion that you had lunch with him at the Mayfair, have a conversation with Mr. Tomsone in which he told you that he hadn't brought any money and you said, "Well, I will be willing to wait for it"?

A. No, I did not have that conversation. I believe that is the date when he threw his checkbook down and asked me if I would take a check, and I said no.

Q. On that occasion did Mr. Tomsone say to you, in substance and effect, that he had been advised to pay you by check and you told him, "No, it has to be strictly cash"?

A. No, sir; there was no such conversation.

Q. Did you tell him on that occasion that you were going to be off work for a few days, that is, on Friday following the time you went to the Mayfair for lunch?

A. No.

Q. Did you take any time off from your days at work between the time that you had had lunch with him at the Mayfair, in the early part of October, and the time your services were terminated about the 18th of October?

A. No, I took no time off.

Q. You were there every day, that is, every working day that you were required to be there?

A. That is correct. [229]

Q. Do you recall the 18th of October 1946?

A. Yes, I do.

Q. Were you at work on that day, Doctor?

A. I was at work that day.

(Testimony of Theodore S. Gage)

Q. Did you go to lunch at the usual hour?

A. I left at the usual hour; yes.

Q. That is at noon? A. At noon.

Q. Where did you go?

A. I had an appointment with Dr. Frank Otto, who was then the president of the California Medical Board of Examiners. I had an appointment to meet him at his office at 12:30 on October 18, 1946.

Q. Now without relating any conversation that took place between you and that doctor, just generally what was the purpose of your appointment with him on that day?

A. To discuss the taking of the California examination again.

Q. Were you still desirous of taking the California State Board examination? A. Yes, I was.

Q. That is, to permit you to practice medicine and surgery in the state of California?

A. That is correct.

Q. Incidentally, in connection with your work at the [230] Veterans Administration in Sawtelle, it is necessary or is it a requirement that you be admitted to practice medicine or surgery in the state of California in order to be employed there as a physician or surgeon?

A. No, it is not required. The Government recognizes a license from any of the states in the Union in its service.

Q. But your activities are confined strictly to the Veterans Administration unless you are licensed to practice in the state of California?

A. That is correct. The activities are definitely confined.

Q. Did you keep your appointment then there with—who did you say it was? A. Dr. Frank Otto.

(Testimony of Theodore S. Gage)

Q. With Dr. Frank Otto on that day?

A. I did.

Q. What time did you return to the Veterans Administration?

A. It must have been sometime after 2:00 o'clock, probably between 2:15 and 2:30.

Q. Had you made any prior arrangements to meet Mr. Tomsone at the Veterans Administration that afternoon?

A. No, I had not.

Q. Had you made any prior arrangements to meet him any place that day? [231]

A. No, I had not.

Q. When you returned from your appointment, did you see Mr. Tomsone at the Veterans Administration at any time that afternoon?

A. Well, I came to my office, of course I was late, I should only have taken from 12:00 to 1:00, so I was in a hurry. I got back into my office and changed from my street coat to my white gown, and Dr. Strachan came into my office and said, "Hubert is looking for you."

I said, "What does he want?"

He said, "I don't know. He has been looking for you all afternoon."

I said, "I just got back from this thing and I am kind of hungry," and Dr. Strachan left and Mr. Tomsone came in.

Q. Did you have some conversation with Mr. Tomsone at that time?

A. I asked him what he wanted, and I said to him, "I am late. I haven't had any lunch and I thought maybe I would go down to the canteen and have a cup of coffee."

He said, "Let's go down to the canteen and have a cup of coffee."

(Testimony of Theodore S. Gage)

Q. Did you go with him to the canteen?

A. Yes, I went to the canteen.

Q. While you were in the canteen, did you and Mr. Tomson engage in any conversation? [232]

A. No, there was no conversation.

Q. How long were you in the canteen approximately?

A. Oh, the required time to drink a cup of coffee.

Q. What did you do after that?

A. Then we left and came back towards the main corridor of the outpatient building, and as I got to the intersection where it splits to go down to my office, I told him I was going down to the parking lot to my car to get some notes out of my car.

Q. Did you ask him to go with you?

A. No, he followed along.

Q. Your car was then parked in the auto park near—

A. In back of the hospital.

Q. In back of the hospital? A. That is right.

Q. Did you go out there in your white gown? You had your white gown on?

A. Yes, I went out in my white gown.

Q. What notes did you have out there in the car that you went to get?

A. I had some notes—I had been doing some research work, or some clinical work, on new treatments for the back, painful backs, and we had been gathering a lot of notes on our results and I was tabulating them and putting them in a paper form for publication. I had left those notes on the front [233] seat of my car.

Q. Was that your purpose in going to your car after you had had a cup of coffee at the canteen?

A. Yes, sir; that was my purpose in going to the car.

(Testimony of Theodore S. Gage)

Q. Now what, if anything, did Mr. Tomson say or do when you went over to your car that afternoon?

A. I opened the front door, took my notes and, as I turned to face him, he extended his hand and in the palm of his hand he had a roll of bills, and he said, "Here, take this."

And I said, "What for?"

He said, "Well, you can use it. Take it."

Q. Did you take it? A. I did take it.

Q. What if anything did you do with it?

A. I put it, just as he had given it to me, in my left-hand pocket and walked back from the car into my office.

Q. Did you count it at any time? A. I did not.

Q. Did you know how much money was there at that time? A. I did not.

Q. Did you then go back into your office?

A. Yes, I walked into my office.

Q. What if anything happened when you went into your office? [234]

A. Well, I walked into my office, laid the notes on the table, and just then a patient came in, Mr. Tomson came in, and I got to asking the patient one or two questions, and before I turned around four men had broken into the office and one of them said, "Dr. Gage?"

I said, "Yes."

He flashed a badge, U. S. Forestry Service, and I looked at it and I couldn't understand what it was, and he said, "You are under arrest."

Q. Were you asked if you had the money?

A. He said, "You have some money on you?"

And I said, "Yes."

Q. Did he ask you where it was? A. No.

(Testimony of Theodore S. Gage)

The Court: Where was it?

The Witness: It was in my left-hand pocket, sir.

By Mr. Sullivan:

Q. Did you remove it from your pocket, or did he?

A. I made an attempt to but he said, "Don't. Somebody else will do it." And they searched me.

The Court: When did you put it in your pocket?

The Witness: Out at the car park.

By Mr. Sullivan:

Q. When you were out at the auto park?

A. When I was out at the auto park. [235]

The Court: I thought you said you just threw it on the table.

The Witness: Oh, no, that was the notes I had in my hand.

By Mr. Sullivan:

Q. When you received this money that, when Mr. Tomson handed you this money and you put it in your pocket, what did you intend to do with it?

A. It was my intention to go to Dr. Long and put it on his desk and say, "Now hear the whole story."

Q. You had only been in your office a very short time until you were arrested, is that correct?

A. It couldn't have been more than a couple of minutes.

Q. At the time, on October 18, or at any time on or about that date, did you ever have any intention in your mind and heart to receive from Mr. Tomson any money for the purpose and with the intent of having your decision and action on any matters that might be brought before

(Testimony of Theodore S. Gage)

you in your official capacity as an orthopedic surgeon at the Veterans Administration influenced thereby?

A. Definitely not.

Q. Did you ever accept any money from Mr. Tomsone with the intention that you would cause more orders to be written for orthopedic shoes under his contract?

A. I did not. [236]

Q. Did you on or about the third day of October 1946, or any other time, ask Mr. Tomsone to pay or to give you any money with the intent to have your decision and action on any matters that might be brought before you in your official capacity as an orthopedic surgeon at the Veterans Administration in Sawtelle influenced thereby?

A. I did not.

Q. Did you ever at any time ask Mr. Tomsone to give you any money with the intention that in so doing that you would cause more orders to be written for orthopedic shoes under the contract which the Administration had with Mr. Tomsone?

A. I did not; no, sir.

Q. Could you tell the jury, Doctor, approximately how many patients or veterans that you examined each day there at the Veterans Administration, that is, that you personally examined?

A. Well, the average was about 30, and it fluctuated from 30 to 50, depending on whether the day was a clinic day or not. I held two clinics a week, on Tuesdays and Fridays, at which time I saw consultations from all over the city, from the office downtown, from other branches of the hospital—not the hospital, the outpatient service—and anybody that might come in for clinic treatment.

Q. How many days a week did you work there? [237]

A. When I started there it was a five and a half day week. I put in a five and a half day week.

(Testimony of Theodore S. Gage)

Q. You had Saturday afternoons and Sundays off?

A. That is correct.

Q. Were there any other occasions when you, after the examination of a patient, felt that he might have needed some orthopedic or corrective shoes and according to your diagnosis such was not required and you refused to issue a prescription to him, or where you had any complaint from the veteran or the patient in regard to your decision?

A. I had no complaints to me personally.

The Court: From the veteran?

The Witness: From the veteran.

By Mr. Sullivan:

Q. I think that you testified yesterday that there were instances where in your opinion as an orthopedic surgeon, orthopedic or corrective shoes were not required and that you did refuse to issue a prescription.

A. That is correct.

Q. Now in any instance where in your opinion an orthopedic or corrective shoe was not required, and you refused to issue a prescription, was that your honest and conscientious opinion as an orthopedic physician?

A. That is correct.

Q. And in every instance where you issued a prescription [238] for orthopedic or corrective shoes, or issued a prescription for such supports or for modification of shoes, was it your honest and conscientious opinion as an orthopedic physician and surgeon that such things were required?

A. That is correct.

Mr. Sullivan: I think that is all, your Honor.

The Court: Cross examine.

(Testimony of Theodore S. Gage)

Cross Examination

By Mr. Neukom:

Q. Dr. Gage, you have seen this money before, haven't you? A. I don't know.

Q. Did you have in your hands on October 18th a roll of money which approximates the feel of that?

A. I wouldn't remember what the feel is. I had in my hand on that date a roll of money.

Q. Mr. Chapman is the manager of the Veterans Facility, isn't he?

A. That is correct, of the Regional Office.

Q. In other words, he is the top man, isn't he?

A. That is correct, sir.

Q. Mr. Chapman had always accorded you considerable decency and kindness in any complaints that you had taken to him, had he not?

A. I only came to him on one specific instance. [239]

Q. He had an open door, was your testimony.

A. That is correct.

Q. And he talked to you? A. That is right.

Q. And you told him about complaints and troubles that you had been having? A. That is right.

Q. And you told him about difficulties encountered with Mr. Tomsone, didn't you? A. I did.

Q. Why didn't you go to Col. Chapman's office right after you had received this money in the auto park and thrown it on his desk and tell him about it?

A. With the office full of men I couldn't get out.

Q. Dr. Gage, would you have us understand that after you had had relations with a man, Mr. Tomsone, that you believed were irregular, who offered you a bribe, that the most important thing in your mind would not have been

(Testimony of Theodore S. Gage)

to have gone to Col. Chapman and have laid that matter before him?

A. It was my intention to go to my superiors.

Q. Would you have us believe, as you have expressed opinions here and expressed your conscience, would you have us believe that there was anything more important in your mind than to free yourself of any implication of having accepted this money from Mr. Tomsone? [240]

A. No, I would not have you believe otherwise.

Q. Yet you did go into your office, didn't you?

A. Yes.

Q. As a matter of fact, you said to the agents when they came in, words to this effect, "I expected this." You knew this would happen, didn't you?

A. I did not say that to any agent or anyone.

Q. Do you recognize the gentleman that I am about to take a badge from?

A. I recognize Mr. Davis; yes.

Q. He accompanied the officers that made the arrest?

A. That is correct. He was the arresting officer.

Q. And didn't he display to you this badge when he made the arrest?

A. (Examining) He did not.

Q. He didn't display to you a Federal Bureau of Investigation badge? A. No, sir, he did not.

Q. He displayed to you a Forrestry Service badge?

A. That is correct. I commented to him about it. I said, "When does the FBI use Forestry Service badges?" And he said, "Oh, we use many kinds."

(Testimony of Theodore S. Gage)

Q. Is it not true that the Mayfair Restaurant, where you and Mr. Tomsons went to lunch, that your wife happened to be in that restaurant on October 3rd? [241]

A. She didn't happen to be there; no, sir.

Q. She wasn't there?

A. She came in as we were leaving with a party of women.

Q. As a matter of fact, that explains how you happened to direct Mr. Tomsons to go there, doesn't it?

A. Definitely not.

Q. It is merely a coincidence that she happened to be there the same time? A. Exactly; yes.

Q. Early in October you gave to Mr. Tomsons, I believe your address where you were living in Santa Monica, isn't that correct? A. No, sir.

Q. When was it then?

A. Sometime in September, the early part of September.

Q. Very well. Prior to that time you had noted that Mr. Tomsons's work was defective and inferior, hadn't you? A. That is right.

Q. And you had complained, so you state, to Dr. Long and to your other co-assistants about the inferiority of his work, hadn't you? A. That is correct.

Q. And you felt that he was not giving the Government a square deal, didn't you?

A. That is correct. [242]

Q. And in your opinion he was cheating the Government, wasn't he? A. That is correct.

Q. He spoke to you about wanting to come over to your house to give you spaghetti, didn't he?

A. No, he did not.

(Testimony of Theodore S. Gage)

Q. He suggested to you that he could suggest where you could have a spaghetti feed?

A. He said that he would take us to dinner.

Q. Dr. Gage, would you have this jury believe that a man was cheating the Government under defective shoes, defective material, would be the type of man that you would suggest take you and your wife out to dinner?

A. I see nothing wrong with that.

Q. When he offered you the check book out on your desk, will you please tell me your very words that you told Col. Bringham about that incident.

A. I never spoke to Col. Bringham.

Q. Did you ever speak to Col. Bringham at all with regard to what you considered was the defective character of Mr. Tomsone's shoes and devices?

A. I did not ever speak to Col. Bringham at any time pertaining to Mr. Hubert Tomsone.

Q. Col. Bringham used to be the head out there—I am sorry. [243]

Did you ever speak to Mr. Chapman with respect to a check, the incident with Mr. Tomsone that put upon your desk his checkbook and told you to write out a check?

A. No, I did not speak to Mr. Chapman about that.

Q. As a matter of fact, what you spoke to Mr. Chapman about was a matter involving your difficulty because of your own abusive conduct with a clerk, difficulty that you had had there at the offices, isn't that so?

A. That is not correct.

Q. You had had difficulty and you had told Mr. Nie that you had had difficulty with the clerk out there, isn't that true?

A. I had had no difficulty with any clerk.

(Testimony of Theodore S. Gage)

Q. Dr. Gage, isn't it true that when you first went to work for this establishment, like you have testified upon direct examination, I believe that you told Dr. Long you had no intention of staying but a very short time?

A. That is correct.

Q. As a matter of fact, it might have been just a matter of a few weeks, isn't that true?

A. That is correct.

Q. Dr. Gage, how did you happen to then have such an inquisitive mind as to this contract if you knew that you were only going to stay a few weeks, this shoe contract?

A. My staying was predicated, or the length of my stay, [244] as I testified, was predicated upon the receiving of a license to practice in the state of California. I told that to Dr. Long, and when I failed the examination on August 3rd, there was nothing further said, and since it was my intent to stay here and take it again I just continued working.

As to my inquisitiveness about the contract, the things were so glaring that one would have to put blinders on and a mask not to see the defects.

Q. In the contract?

A. Both in the contract and in the execution of the contract.

Q. Dr. Gage, I am going to show you Government's Exhibit No. 3, and I assume this is the contract that you referred to, isn't it?

A. (Examining document) This is a copy of it; yes.

(Testimony of Theodore S. Gage)

Q. Very well. You had access to another duplicate copy, isn't that correct? A. That is correct.

Q. Didn't this contract have embodied as a part of it 51 distinct items that were specifically referred to?

A. That is correct.

Q. And they covered virtually the whole field of orthopedic supplies, so far as shoes are concerned, did they not?

A. That is incorrect. They did not cover the entire field. [245]

Q. This is a standard form, as you will note, approved U. S. Standard Form 33, revised, approved by the Secretary of the Treasury January 17, 1939, isn't that correct?

A. The first six pages of this contract are the accepted standard form of it approved by the Secretary. The remainder is a mimeographed form that does not state except it is Medical Form 2618 c.

Q. You will note that this is an instrument which is an invitation from the Government to a person rather than a person preparing this for the Government's acceptance, isn't that true? A. It perhaps is.

Q. Now, Doctor, let's you and I read some of this contract. Will you turn to page 3, item 7. You had read this contract before Mr. Hubert Tomsone returned and you and he had your argument after which you made up and became friends? You had read it before that, hadn't you? A. Yes, sir.

(Testimony of Theodore S. Gage)

Q. Reading No. 7: "The Facility reserves the right to reject all items which are faulty in construction, or in which the materials are of unsatisfactory quality." You have read that? A. I have read that.

Q. And as a doctor prescribing shoes you knew that it was your duty to approve, inspect and check all shoes that [246] Mr. Tomsone furnished pursuant to this contract, didn't you? A. That is correct.

Q. It was one of your obligations, wasn't it?

A. That is right.

Q. Will you please read item No. 8: "No item will be approved for payment until it has been inspected by an authorized representative of the Facility. Acceptance will be governed by the quality of materials, character of workmanship and accuracy of fittings. Before final rejection is made, reasonable opportunity will be given contractor to make the required corrections of faults and adjustments." You were familiar with that?

A. Yes, I was.

Q. As a matter of fact, Doctor, you knew that if any single item made by Mr. Tomsone did not receive your approval or one of your co-associate's approval, that he wouldn't get one thin dime for it until he corrected it, isn't that correct? A. That is correct.

The Court: I see it is 12:00 o'clock. Recess until 2:00. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock of the same date.) [247]

Los Angeles, California, December 12, 1946, 2:00 p.m.

The Court: Are you ready to proceed, gentlemen?

Mr. Sullivan: We are ready, your Honor.

The Court: The usual stipulation?

Mr. Sullivan: Yes, the usual stipulation.

Mr. Neukom: Yes, your Honor.

The Court: Mr. Gage, will you take the stand?

THEODORE S. GAGE,

called as a witness by and on behalf of the defendant,
having been previously duly sworn, resumed the stand and
testified further as follows:

Cross Examination (Resumed)

By Mr. Neukom:

Q. Dr. Gage, could it have been that you took annual leave from the 7th to the 10th of October of 1946, rather than in the last week of September?

A. I don't think so.

Q. At any rate, when you took your annual leave that was the occasion that you and your wife went to Mr. Tomsons's shop on West 7th Street, is that correct?

A. It was during that time.

Q. And your wife only went there upon one occasion?

A. That is correct.

Q. And Mr. Tomsons was going to make some corrective shoes or work upon some shoes that your wife had, is that [248] correct?

A. He did work upon the shoes that she wore into the shop that day.

Q. And that was after you had ascertained that Mr. Tomsons's work was imperfect and was not of high quality, isn't that true?

A. No, sir.

(Testimony of Theodore S. Gage)

Q. When did you first ascertain that Mr. Tomisone's work was inferior and not of good quality?

A. His work at the Veterans Hospital I ascertained early in my employment in August was of inferior quality and craftsmanship according to the specifications noted in the contract.

Q. Wasn't it late in September, according to your testimony upon direct examination, that you and your wife went down to the shop?

A. That is correct. And the type of work that he did—I supervised it personally and any ordinary shoemaker could have done as much.

Q. You were working for the Veterans Administration on October 18th at the hour of, between two and three, at the time you had this \$100.00 in your pocket, were you not?

A. Not at that hour, sir, not at two o'clock.

Q. At the hour of three o'clock then?

A. At about three o'clock, yes, sir. [249]

Q. And prior to that time you had authority to prescribe to veterans for the manufacture of specially built shoes that were to be built by Mr. Tomisone, did you not?

A. I had authority with restrictions.

Q. Well, at least you were clothed and were permitted to make recommendations or to write prescriptions for such shoes, were you not?

A. In my professional capacity, yes.

Q. And you did, did you not?

A. That is correct.

Q. May I inquire of you, Dr. Gage, is it not true that many shoes that are built for people who have unusual deformities and defects, is it not quite usual that over

(Testimony of Theodore S. Gage)

a course of time that people will complain for one reason or another about such devices?

A. Not as a general rule, no, sir, not with the disabilities that we see there.

Q. It has been your experience then, with the exception of Mr. Tomsone, that all orthopedic constructors of devices and shoes have without fail made a person satisfactory shoes in all instances?

A. Those that were orthopedic craftsmen and technicians did, yes, sir.

Q. And you have known of no one in that category that has ever had to remodify or change or alter the shoes from the [250] original prescription?

A. That is part of the building process, the changing and modification and rebuilding until a perfect fit is made.

Q. Then if I understand you correctly, it is true, is it not, that in dealing with a person who has an ailment, an unfortunate ailment of the foot or leg that there are elements that have to be gone through—in other words, it is a progressive matter of correcting his ailment to a particular shoe, isn't that true?

A. No, sir. Counsel is restricting his questions now to an ailment, the type of work that I did, had to do with disabilities, war injuries—the residuals of war wounds.

Q. Didn't you prescribe shoes?

A. That is correct, I did prescribe shoes.

Q. Shoes that were built by Mr. Tomsone?

A. That is correct.

Q. And is it not true that a shoe that is put on today may not be satisfactory three months or six months from

(Testimony of Theodore S. Gage)

now as a condition may correct itself from the initial correction of the first shoe?

A. That is not generally correct, no, sir.

Q. Would you say that that is unusual?

A. In the type of injuries I was dealing with I would say it was unusual, yes, sir.

Q. Doctor, is it not true that a person may start wear- [251] ing a corrective shoe and they are wearing the corrective shoe to overcome or to assist the disability they are suffering from, aren't they?

A. I don't believe that counsel understand the type of work we did out there. In a corrective shoe—I believe counsel refers to an ailment, as he said. We were dealing with total disabilities. We were dealing with a man who came in with a half a foot. He only had the back portion of a foot or he only had one toe on the foot and we had to make shoes for that man so he could walk out in society and look like everyone else. There was no progressive change in that particular case and those were the only type of cases I saw. They were the service connected injuries. I had nothing to do whatsoever with non-service connected injuries.

Q. Did you find that sometimes people had broken-down arches?

A. Yes, there were many of those.

Q. And they are just as the term states—they use corrective shoes, don't they?

A. Those were usually non-service connected injuries. There were a few at times that had service connection. I think the majority of the cases that I saw there that required arch supports for correction were perhaps World War I veterans and what the procedure in those days or

(Testimony of Theodore S. Gage)

the regulations, I do not know. I am not conversant or acquainted with [252] what they were in those days.

Q. Did you know a patient by the name of Arthur L. Valentine? A. I do.

Q. And you knew when you came to work that the former head of the orthopedic department had approved him for shoes, did you not? A. I did not.

Q. Did you not know that Dr. Nie had also approved Arthur L. Valentine for shoes?

A. Previously to my coming on this job I understand from the record that Dr. Nie had prescribed a pair of specially-built shoes for Mr. Valentine.

Q. And then is it not true that you obtained the file and countermanded Dr. Nie's order for shoes early in September? A. That is definitely not true.

Q. You did not countermand or cancel an order that Dr. Nie had made?

A. I did not countermand nor cancel an order.

Q. Did you have anything to do with the cessation or the temporary stopping of providing shoes for Mr. Valentine?

A. Yes. Mr. Valentine came to me and complained about the shoes that he had from Hubert Tomson. He said they had never been a proper fit and he was quite perturbed about [253] it. He said he had come to Dr. Nie, had seen Dr. Nie who had prescribed these shoes for him and he wasn't at all satisfied with them and he was mighty tired of being, as he put it, if I remember his words, "pushed around", and he wanted something done. He had heard there was a new orthopedic man there and he came to me. I examined Mr. Valentine's feet. I told him that from my examination and my honest medical

(Testimony of Theodore S. Gage)

opinion that he did not require a special pair of \$43.00 orthopedic shoes; that if he would bring in any pair of shoes that he could buy in any store in town I would see that they were modified with the proper correction which I believed would give him the proper relief. He was quite perturbed about that and he said, "I won't accept that. I have always gotten a pair of shoes here and I am entitled to them." I said to him, "Mr. Valentine, it is not a question of whether you are entitled to it. It is a question of whether the indication exists. I recognize that we are all entitled—we are all veterans, but in my capacity here I feel that spending Government money is a little—"

Mr. Neukom: I object to the speech from the witness.

Mr. Sullivan: He is telling what he said to Valentine.

The Court: Objection overruled. This is a conversation.

The Witness: This is a conversation.

Mr. Neukom: May we have it read so we can understand the tenor or the nature of the conversation? [254]

The Court: I don't think there is any necessity for reading the question and answer.

Mr. Neukom: All right, your Honor.

The Witness: I tried to make Mr. Valentine understand that it was not that I was refusing him—

The Court: What did you say to him?

The Witness: I said that I felt that as the chief of this department it was not a question of whether he was entitled to it; it was a question of whether the indication existed, whether the pathology was there in his feet and according to regulations necessitated a special pair of shoes being built for him. He walked out of my office quite unsatisfied. I did not see him until some weeks later when

(Testimony of Theodore S. Gage)

I discovered, or, I was told that he had gone into Dr. Long and complained that I had refused him a pair of special built shoes.

I told Dr. Long it was not a refusal; that I saw no necessity for prescribing a pair of specially built shoes; that I had recommended, as the record will show, that his shoes be modified on his own shoes.

Well, it was quite an argument—

The Court: We are getting way off of the question now.

The Witness: Well, that is the story.

The Court: We were talking about a conversation you had with Mr. Valentine. [255]

The Witness: That is the end of the conversation.

Q. By Mr. Neukom: You knew that Dr. Nie had ordered shoes of a similar character that he had been wearing just prior to this conversation you had with him, did you not?

A. Oh, I knew that Dr. Nie before me for 17 years had prescribed lots of shoes.

The Court: The question was whether or not you knew he prescribed shoes for this man.

The Witness: The pair of shoes previous? Yes.

Q. By Mr. Neukom: Then a few weeks later you did put in a prescription authorizing this man to get this pair of shoes, did you not? A. That is correct.

Q. As a matter of fact, Dr. Gage, wasn't what was in your mind when you were looking at this contract and reading all of its provisions and going over the items that you claimed were deficient and that this contract was not fair, wasn't it actually in your mind the fact that you then were contemplating in your mind a means whereby

(Testimony of Theodore S. Gage)

you could get a secession of that contract and could secure it yourself? A. Definitely not.

Q. Doctor, is it customary for a doctor as soon as he goes to work for an organization to immediately start in finding out all about the financial aspects and the contractual aspects of a Veterans Administration contract with a contractor? [256]

Mr. Sullivan: I am going to object to that as calling for a conclusion on his part.

Mr. Neukom: I will withdraw the question.

Q. You knew Mr. Tomisone had had a contract for three years before that, didn't you? A. I did not.

Q. You knew that he had had a contract there with the Veterans Administration, didn't you?

A. I knew he had the present one.

Q. And you felt that you were going to step in there within a month's time and alter all of the existing conditions there, is that correct?

A. That is not correct, no, sir.

Q. Will you tell us what you told Dr. Long about—specifically as to what was wrong with the work that Mr. Tomisone was doing?

A. I could sit here for the next 24 hours, perhaps, telling that.

Q. I will stay as long as you will.

A. On numerous occasions at the beginning, in August, when I started to work there and then later complaints started to come in.

Q. I am asking you what you told Dr. Long?

A. I am getting to that, Mr. Counsel.

The Court: Answer the question, Mr. Witness. Your [257] lawyer is here. He will give you an oppor-

(Testimony of Theodore S. Gage)

tunity to explain anything that needs explaining. Counsel wants to know what you told Dr. Long. That is the question. It is very simple.

Q. By Mr. Neukom: About the imperfection of Mr. Tomsone's work. That is my question.

A. Well, one of the specific incidents comes to me in which a shoe—

The Court: What did you tell Dr. Long?

The Witness: Well, I had to bring this shoe into it.

The Court: Tell us what you told Dr. Long and then you may explain afterwards.

The Witness: I told Dr. Long this shoe did not meet the terms of the contract; that certain specifications of the contract were being violated; that certain changes or certain modifications in the shoes were being made in excess of the price charged the general public as stipulated in the contract. That in the specially built shoes for which the Government was paying \$43.00, it called for prime leather and there was no prime leather. I told him that in the—

The Court: Just a moment.

You may proceed.

The Witness: That in many of the specially built shoes where the contract called for the steel shank there was no steel shank in there. That the heel was usually nailed directly to the sole in contradiction to the ordinary art of [258] shoemaking; that a platform was usually placed there first before the rubber heel was nailed on. As a result of that the nails many times went through on the inside of the shoe. That the eyelets were not properly made. That the linings did not last. That the leather cracked.

(Testimony of Theodore S. Gage)

Q. By Mr. Neukom: Is that all?

A. That is all, sir.

Q. These shoes that were built by Mr. Tomsone were all specially built, weren't they?

A. That is correct.

Q. It was not like going into a store and being able to buy a pair of shoes? A. As a rule, no.

Q. And \$43.00 for a pair of specially built shoes where a cast is used and much labor is consumed on one individual, custom job, is not an exorbitant price, is it, Dr. Gage?

A. I would say it is a very cheap price. There was no cast ever made to my knowledge during my employment there by Mr. Tomsone at the hospital or at the outpatient department.

Q. Specially built shoes and the following of minute descriptions which you gave for a custom job, \$43.00 is not a high price, is it?

A. I said, Mr. Counsel, that present rates today—under present rates it is very cheap. I don't see how he could produce a good shoe at that price. [259]

Q. Then that phase of the contract was very reasonable, was it not? A. I would say the price, yes.

Q. Now, did you tell Mr. Chapman substantially the same thing that you told Dr. Long?

A. Substantially the same.

Q. You saw him only upon one occasion?

A. One occasion, right, sir.

Q. You were taken to the office of the FBI, were you not? A. That is right.

Q. And you asked to place a call to your wife, did you not? A. Yes, sir.

(Testimony of Theodore S. Gage)

Q. And at about 5:38 p.m. you were advised that the call had come through? A. Yes.

The Court: We will have to take a short recess here.
(Short recess.)

The Court: You may proceed.

Q. By Mr. Neukom: Before the recess I was inquiring of you if a call was not placed while you were in the office of the FBI in the William Tell Motel about the hour of 5:30 or thereabouts?

A. I believe that is correct. [260]

Q. And you talked to your wife, did you not, on the telephone? A. I believe so, yes, sir.

Q. And you were talking in the presence of Agent Davis to my right here, were you?

A. That is correct.

Q. And among other things didn't you say after some conversation on the telephone, "Yes, I took the money—took that money"? Did you say that or did you not?

A. I have admitted that I took the money.

The Court: Just a moment. Read the question.

(Question read.)

The Witness: I don't remember that conversation in Mr. Davis' office.

Q. By Mr. Neukom: From the time that you had taken the money until the time that you talked to your wife on the telephone you had not talked to her in that intervening period, had you?

A. No, I hadn't seen her from the time I left the house in the morning.

Q. Had you talked to her? A. No.

Q. Didn't you also state: "I can't mention that over the telephone"?

(Testimony of Theodore S. Gage)

A. I don't recall that conversation at that time. At [261] that moment I was pretty excited and quite nervous and upset.

Mr. Neukom: That is all.

The Court: Redirect.

Mr. Sullivan: Just one or two questions, your Honor.

Redirect Examination

By Mr. Sullivan:

Q. Dr. Gage, in your cross examination you testified that after refusing to issue a special order to Mr. Valentine for a pair of specially built shoes or a prescription for a special pair of specially built shoes, that a few weeks later you did authorize him to procure a pair of shoes. Is that correct? A. That is correct.

Q. And why did you a few weeks thereafter issue a prescription to him to secure a pair of specially built shoes?

A. I was told to by Dr. Long. It seemed to be the policy of appeasement. If the veteran raised enough rumpus there he would much rather let him have his own way than to stand up for the men that worked under him as a subordinate.

Mr. Neukom: Do I understand the latter part of his answer is a statement made to Dr. Long or is it a statement of the witness? I move it be stricken.

Mr. Sullivan: I think it is an explanation as to why he issued the order.

Mr. Neukom: I will withdraw my objection. [262]

The Court: Very well.

Q. By Mr. Sullivan: Were there any other instances during the time that you were employed there when you refused to issue a prescription for a pair of shoes when

(Testimony of Theodore S. Gage)

you had received any instructions from Dr. Long or anyone else to issue the prescription?

A. Oh, yes, there were a number of occasions.

Q. Now, you testified that you regarded it reasonable that \$43.00—that \$43.00 was a reasonable value for a pair of specially built shoes, is that correct?

A. That is correct.

Q. Now, when you said that \$43.00 was a reasonable value for a pair of specially built shoes were you referring to what would be the reasonable value of a pair of specially built shoes which were built according to the specifications of the contract that existed between the Veterans Administration and Mr. Tomsone?

A. That is correct.

Q. During your years of practice as an orthopedic surgeon have you had occasion to order shoes for people, that is, specially built shoes? A. Many times.

Q. And are you familiar with the reasonable value of specially built shoes, orthopedic shoes?

A. I am. [263]

Q. And while you were employed at the Veterans Administration did you have occasion to examine the specially built shoes that were made by Mr. Tomsone under the contract which he had with the Administration?

A. I did.

Q. And do you have an opinion as to the reasonable value of the shoes that he was making?

A. They were not worth—

Mr. Neukom: I object to this as being too general and too indefinite and not a proper foundation. There isn't any proper qualification as to time. There has been no

(Testimony of Theodore S. Gage)

testimony that this witness knew anything about the price of shoes at the date in question.

The Court: Overruled.

The Witness: I believe the price was in excess—it was too much for the value in the shoe he produced for the Government.

Q. By Mr. Sullivan: You were arrested at what time, Dr. Gage, on the 18th, approximately?

A. Approximately three o'clock.

Q. What was your usual hour for leaving work out there? A. 4:45 was my quitting time.

Q. And after being arrested you were in custody continuously from that time until you made this telephone call to your wife? [264] A. I was.

Q. And you were in custody of the FBI during all that period of time? A. That is correct.

Q. And before making this call to your wife had you been permitted to communicate with anyone whatsoever?

A. No, sir. I asked if I might and I was told I could not.

Q. And had you consulted or been advised by any attorney with relation to your rights? A. No.

Mr. Sullivan: I think that is all I have, Doctor.

Mr. Neukom: Just one question.

Recross Examination

By Mr. Neukom:

Q. You had not consulted or been advised by an attorney when you accepted the \$100.00 from Mr. Tomsone?

A. No, I had not.

Mr. Neukom: That is all.

Mr. Sullivan: That is all, Doctor.

The Court: Step down. Next witness. [265]

CHARLES E. STRACHAN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Charles E. Strachan.

Direct Examination

By Mr. Sullivan:

Q. And you address?

A. 2864 Themall, Los Angeles.

Mr. Sullivan: Shall we wait until we get the other reporter?

The Court: Go ahead. We will have to stop at three o'clock and have another change of reporters.

Q. By Mr. Sullivan: What is your business or profession? A. I am a physician.

Q. Are you a graduate of any medical college?

A. College of Medical Evangelists.

Q. When did you graduate from the College of Medical Evangelists? A. 1945.

The Court: Los Angeles?

The Witness: Yes.

Q. By Mr. Sullivan: And what is your occupation at [266] the present time?

A. I am a physician. Just how do you mean? Who am I employed by?

Q. Are you actively engaged in your profession as a physician at the present time? A. Yes, sir; I am.

Q. And are you practicing for yourself or are you employed somewhere?

A. I am employed by the Army of the United States.

Q. And in connection with that are you employed as a doctor? A. That is right.

(Testimony of Charles E. Strachan)

Q. And in connection with your employment as a doctor by the Army of the United States, where are you assigned?

A. The Los Angeles Regional Office of the Veterans Administration.

Q. Is that out here at a place known commonly as Sawtelle?

A. It is now, yes, sir.

Q. And how long have you been assigned to that Veterans Administration at Sawtelle?

A. I believe it was since August 28th, 1946.

Q. And are you acquainted with Dr. Theodore Gage, the gentleman seated at counsel table?

A. Yes, sir, I am. [267]

Q. And when did you first meet Dr. Gage?

A. I don't remember exactly. I believe it was some time in September.

Q. Were you ever assigned to work in the orthopedic unit at the Veterans Administration, outpatient department?

A. Yes, I was.

Q. When were you assigned to the orthopedic unit there?

A. I believe it was some time in September. I don't exactly remember when.

Q. You don't remember the exact date?

A. No, sir, I do not.

Q. Well, in connection with your assignment to the orthopedic unit of the Veterans Administration did you have occasion there to see and observe the manner in which Dr. Gage examined and diagnosed the conditions of patients who came under his jurisdiction there?

A. Yes, sir.

Mr. Neukom: I object because I think this is collateral. This man is not being tried for malfeasance in office or

(Testimony of Charles E. Strachan)

for his ability or lack of ability. It is a collateral issue to the whole case. The whole issue in this case is whether or not—I base my objection upon that ground, your Honor.

The Court: Well, the examination of this witness has not proceeded sufficiently far to enable me to make a conclusion as to precisely what is expected to be proven. For the [268] present the objection is overruled.

Mr. Sullivan: Your Honor, I am willing to approach the bench with counsel and inform the court.

The Court: Let us proceed. We will know in a moment.

Mr. Sullivan: We haven't an answer to the last question.

The Court: Ask the question again.

Q. By Mr. Sullivan: From your observations of Dr. Gage's work there—withdraw that for a moment.

In what capacity was Dr. Gage employed there, do you know?

A. He was, I guess you would consider he was chief of the outpatient service of the orthopedic unit—I mean, chief of the orthopedic department in the outpatient service.

Q. And from your observation of his examinations and diagnosis of the condition of patients there, did you have occasion to observe his conclusions and recommendations with respect to patients? A. Yes, sir, I did.

Q. And from your observation in that respect, Doctor, do you have an opinion as to whether or not his diagnosis and recommendation in so far as the patients were concerned was honest and sincere?

A. I believe so, yes.

(Testimony of Charles E. Strachan)

Q. Now, was there ever any time when Dr. Gage ever gave you instructions in any way, shape or form to the [269] effect that you were to—I think I am ahead of myself. I will withdraw that for a moment.

In connection with your work there, Doctor, in the orthopedic unit, did you have the authority in cases that came under your observation to issue prescriptions for orthopedic corrective shoes? A. Yes, sir.

The Court: Who gave you that authority?

The Witness: Well, it was a part of my duty as a doctor in that department.

The Court: That went with your appointment?

The Witness: Yes, sir.

The Court: Dr. Gage did not give you that authority?

The Witness: No, sir.

Q. By Mr. Sullivan: And did you ever at any time have any conversation with Dr. Gage in which he instructed you or told you in any manner, way, or shape whatsoever or said anything that would lead you to believe that you were to issue prescriptions for orthopedic shoes in cases where you did not honestly and conscientiously believe the veteran was entitled to them?

Mr. Neukom: That is calling for a conclusion of the witness. It invades the province of the jury.

The Court: Objection sustained.

Mr. Sullivan: That is all I have. [270]

Mr. Neukom: No questions.

The Court: Next witness.

Mr. Sullivan: Dr. Levine.

DAVID I. LEVINE,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: David I. Levine.

The Clerk: And your address?

The Witness: 6417 Lexington Avenue, Hollywood.

The Court: Just a moment. [271]

The Court: Usual stipulation?

Mr. Neukom: Usual stipulation.

Mr. Sullivan: Yes, your Honor.

Direct Examination

By Mr. Sullivan:

Q. What is your profession or occupation, Dr. Levine? A. I am a physician and surgeon.

Q. Are you practicing medicine and surgery at the present time? A. I am.

Q. Where are you practicing at the present time?

A. At the Veterans Administration, Regional Office, outpatient department at Sawtelle.

Q. You are attached to the Veterans Administration at Sawtelle? A. That is correct.

Q. You say at the outpatient department?

A. At the outpatient department.

Q. How long have you been practicing there as a physician and surgeon?

A. Since December 17 of last year.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I am.

(Testimony of David I. Levine)

Q. How long have you known Dr. Gage? [272]

A. From the day he arrived at the Administration.

Q. Do you recall that that was the early part of August of this year?

A. It might have been. I don't recall the exact date.

Q. Would you see him there frequently in connection with his work and your work as doctors at the outpatient department?

A. I did.

Q. Let me ask you this, Dr. Levine: Was there ever any occasion when you heard Dr. Gage make any complaint about work that was being done by a man by the name of Hubert Tomsone who was making orthopedic shoes?

A. Would you repeat that question?

Q. I will withdraw it and reframe it.

Were there ever any occasions when you heard Dr. Gage when he ever made any complaints to you about the manner in which one Hubert Tomsone was making orthopedic shoes for the Administration out there?

A. I do not recall that it was made directly to me, but I do recall hearing the remark in the presence of a group of us.

Q. In the presence of a group of doctors?

A. That is correct.

Q. You heard him complain about Tomsone's shoes?

A. Yes, sir. [273]

(Testimony of David I. Levine)

Q. Do you recall whether or not he complained about the shoes because they weren't built according to the specifications in the contract?

A. I don't recall the exact wording, but I believe the remark was made with reference to the type of shoe, its poor manufacture and various other references along the same line.

Q. Now when you say you heard that made in a group was that among a group of the doctors assigned to the Administration there?

A. That is right.

Mr. Sullivan: That is all.

The Court: Cross examine.

Cross Examination

By Mr. Neukom:

Q. Had you been there quite a while, Dr. Levine?

A. Almost a year.

Q. About a year before that?

A. Why no, since December 17 of last year.

Q. You were in the orthopedic section too?

A. No, sir.

Mr. Neukom: That is all.

Mr. Sullivan: That is all.

The Court: You may be excused. This witness may be permanently excused?

Mr. Neukom: Just one more question, please. [274]

Q. You didn't communicate that complaint to Mr. Chapman, did you?

A. I didn't complain to anyone.

Mr. Neukom: That is all. Thank you.

(Witness excused.)

Mr. Sullivan: Dr. Kane.

THEODORE J. KANE,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Theodore J. Kane; K-a-n-e.

The Clerk: Your address?

The Witness: 632 North Kings Road, Los Angeles.

Direct Examination

By Mr. Sullivan:

Q. What is your business or profession, Dr. Kane?

A. Physician.

Q. Are you practicing as a physician at the present time? A. Yes.

Q. Where are you practicing?

A. At the outpatient department, Regional Office of the Veterans Administration in Los Angeles.

Q. Is that the one that is commonly known as Sawtelle? A. Yes, sir. [275]

Q. How long have you been practicing there as a physician?

A. I started work there in December 1945, worked until about May, had a temporary leave of absence for a couple of months, and started again July 15 and have been working there ever since.

Q. That was July 15 of this year?

A. This year.

Q. In connection with your work there as a physician, did you become acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I did.

(Testimony of Theodore J. Kane)

Q. Do you know approximately when you first met Dr. Gage? A. The day he reported for work.

Q. Did you see him from that time on on frequent occasions until he left the Administration there?

A. Yes, sir.

Q. Were there ever any occasions when you heard Dr. Gage, or when he ever made any complaint to you about the manner in which one Hubert Tomsone was building orthopedic shoes or making orthopedic shoes for the Veterans Administration? A. There was.

Q. That happened on frequent occasions? [276]

A. Several occasions.

Mr. Sullivan: I think that is all. You may cross examine.

Cross Examination

By Mr. Neukom:

Q. What field of medicine were you in, Dr. Kane?

A. I do general practice.

Q. You were not in the orthopedic field?

A. No, sir.

Q. Dr. Gage complained about a lot of things while he was there, didn't he? A. Yes.

Mr. Neukom: That is all.

The Court: You may be excused.

(Witness excused.)

The Court: Next witness.

Mr. Sullivan: Dr. Mazet.

ROBERT MAZET, JR.,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Robert Mazet; M-a-z-e-t, Jr.

The Clerk: Your address?

The Witness: 703 - 24th Street, Santa Monica.

The Clerk: Be seated. [277]

Direct Examination

By Mr. Sullivan:

Q. What is your occupation or profession, please?

A. Physician, sir.

Q. Are you practicing as a physician and surgeon at the present time? A. Yes, sir.

Q. Where are you practicing?

A. Veterans' Hospital in Sawtelle.

Q. To what department of the hospital are you attached? A. Orthopedic department.

Q. Are you attached to the Regional Office or to the—

A. To the hospital.

Q. —to the hospital? A. Yes.

Q. How long have you been attached to the hospital?

A. Since the 1st of July.

Q. Of 1946? A. This year; yes.

Q. The hospital to which you are attached out there does not treat the outpatients, is that correct?

A. That is correct.

Q. They are treated at the Regional Office?

A. Yes, sir.

Q. In connection with your work with the orthopedic [278] department of the hospital, did you have

(Testimony of Robert Mazet, Jr.)

occasion to become acquainted with Dr. Gage, Theodore Gage? · A. Yes, sir.

Q. Do you know in what capacity he was working there? A. Yes.

Q. What was that?

A. He was the head of the orthopedic outpatient department.

Q. Was it your custom and Dr. Gage's custom to confer together from time to time in relation to the orthopedic cases? A. Yes, sir.

Q. Now directing your attention to the early part of September of 1946, do you recall an occasion of being in Dr. Gage's office when Mr. Hubert Tomsone called there and there was somewhat of an argument that ensued between them? A. Yes, sir.

Q. Do you recall whether or not on that occasion overhearing Dr. Gage make some complaint to Mr. Tomsone about the shoes that he was making? A. Yes, sir.

Q. On that occasion did Mr. Tomsone say to Dr. Gage, in substance and effect, or rather did Dr. Gage say to Mr. Tomsone in substance and effect, "How's business?" and Tomsone replied— [279]

Mr. Neukom: Just a moment. I object to leading the witness. I think the witness should be inquired of as to what was said.

Mr. Sullivan: Your witness testified to the specific conversation.

Mr. Neukom: You mean this is for impeachment purposes?

Mr. Sullivan: That is all. I will withdraw it.

(Testimony of Robert Mazet, Jr.)

Mr. Neukom: If that is the purpose, go ahead then.

Mr. Sullivan: That was my only purpose.

The Court: Go ahead.

By Mr. Sullivan:

Q. And Mr. Tomsone replied, "Business is good," to which Dr. Gage said, "I don't think so," and Tomsone said, "Why not?" and Dr. Gage said, in substance and effect, "I know there has to be another change, there have been a lot of veterans getting shoes who are not entitled to them and I have canceled quite a few orders"?

A. I never heard any such conversation between those two people.

Mr. Sullivan: That is all. Thank you, Doctor.

Cross Examination

By Mr. Neukom:

Q. You were not of course present every time that Mr. Tomsone and Dr. Gage spoke to each other, were you?

A. No, sir.

Q. You were entirely separate and apart, were you [280] not?

A. Yes, sir.

The Court: Is that the only time you were present when they discussed any matter?

The Witness: No, sir. I was there several times when Gage and Tomsone were there.

By Mr. Neukom:

Q. When Dr. Gage and Mr. Tomsone were there?

A. Yes.

Q. Mr. Tomsone built shoes for your department, didn't he?

A. Yes.

Q. Mr. Tomsone built shoes for your department, didn't he?

A. Yes.

(Testimony of Robert Mazet, Jr.)

Q. And all shoes that he built had to receive the approval of the doctor when they were accepted?

A. Yes, sir.

Q. And if they were not approved he was not paid, isn't that correct?

A. Yes, sir.

Q. You have inspected his shoes, haven't you?

A. Yes, sir.

Q. Did they meet your specifications?

A. It is a little hard to answer that yes or no. [281]

The Court: You can answer it yes or no and then explain if you wish.

The Witness: Would you say that again?

By Mr. Neukom:

Q. You have inspected shoes that Mr. Tomsone has built and delivered, have you not?

A. Yes, sir.

Q. And you have approved them?

A. Yes, sir.

Q. And by so doing you designated that they met the specifications of the contract, didn't you?

A. Yes, sir.

Mr. Neukom: That is all.

Redirect Examination

By Mr. Sullivan:

Q. When you were asked the question as to whether the shoes met the specifications of the contract, you said it would be hard for you to answer that question.

The Court: Yes or no.

(Testimony of Robert Mazet, Jr.)

Mr. Sullivan: Yes or no, and the Court informed you that you could answer the question yes or no and then explain your answer.

Q. Do you want to offer any explanation of your answer?

A. The thing I had in mind was that as far as specific [282] specifications written down on a piece of paper are concerned, my experience has been such that I can't very well translate that into an actual shoe. In other words, if they say certain specifications written down so-and-so, in terms of a shoe, that doesn't mean a good deal to me. That is what I was getting at.

The Court: Pardon me. Is there a Dr. Kuhn here?

Mr. Sullivan: Dr. Kuhn was here under subpoena and I conferred with Dr. Long and he informed me he was the only doctor he had on duty this afternoon and I let him go back.

The Court: There is a telephone message for him to be at Sawtelle by 4:30.

Mr. Sullivan: I excused him under the circumstances, your Honor.

That is all. I have no further questions.

Mr. Neukom: That is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Sullivan: Mr. Skill.

FRED SKILL,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Fred Skill; S-k-i-l-l. [283]

The Clerk: Your address?

The Witness: 119 West Broadway. That is my business address.

The Clerk: What city?

The Witness: Long Beach.

Direct Examination

By Mr. Sullivan:

Q. Do you live in Long Beach, Mr. Skill?

A. I do.

Q. What is your business or occupation?

A. I have a shoe shop.

Q. By that do you mean a shoe repair shop?

A. Well, shoe repair shop and we make shoes too.

Q. How long have you been in the shoe repair business? A. Since 1910.

Q. How long have you been in the shoe repair business in Long Beach? A. Since 1910.

Q. Are you acquainted with one Hubert Tomisone?

A. I ought to be. He worked for me.

Q. When did you first come to know Mr. Tomisone?

A. I think he worked for me in 1934, '34 or '35.

Q. Do you know approximately how long he worked for you?

A. Well, he didn't work very long because if he did— [284]

(Testimony of Fred Skill)

Mr. Neukom: Just a moment. I know precisely what this type of testimony is. I would like to have the jury excused, or at least allow me to conduct a voir dire on this particular witness. I believe this is an attempt to indirectly accomplish what is forbidden by the code and the cases. It is a delicate matter to discuss in the presence of the jury.

Mr. Sullivan: I have no objection to the jury being excused if counsel desires to discuss it, but I state this to the Court, that I have no intention of indirectly accomplishing what I am not legally entitled to accomplish as far as the evidence is concerned.

Mr. Neukom: I believe this is going to be offered for the purpose of impeachment, and I believe counsel will so concede.

Mr. Sullivan: Yes.

The Court: If it is offered for the purpose of impeachment, impeachment may be accomplished by the direct testimony contradicting the witness' testimony, evidence of his reputation for truth, honesty and integrity in the community where he resides.

Mr. Sullivan: Exactly, your Honor.

Mr. Neukom: There is some remoteness as to the time in question. Those are things that I would like to be able to ascertain on voir dire from this witness.

The Court: Let me ask this witness. You say that Mr. [285] Tomsone worker for you?

The Witness: Yes.

The Court: When?

The Witness: 1934.

The Court: 1934?

The Witness: Yes.

(Testimony of Fred Skill)

The Court: He has not worked for you since?

The Witness: No.

The Court: That was 12 years ago?

The Witness: Yes.

The Court: Ask your next question.

By Mr. Sullivan:

Q. Are you familiar with Mr. Tomsons's general reputation for truth, honesty and integrity in the community in which he has resided?

Mr. Neukom: I object to that as being too remote, your Honor.

The Court: Overruled.

Mr. Neukom: Further I wish to interpose this objection, that the short period of working for a person is not sufficient, as I understand the law. There is law directly upon the proposition. I should be able to inquire if he knows his reputation in the community in which he lives.

The Court: You can cross examine him on that.

Mr. Neukom: Very well, your Honor. [286]

The Court: He just asked him if he knew his reputation and he has a right to answer yes or no.

Mr. Sullivan: Will you repeat the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

("Q. Are you familiar with Mr. Tomsons's general reputation for truth, honesty and integrity in the community in which he has resided?")

(Testimony of Fred Skill)

By Mr. Sullivan:

Q. (Continuing) You can answer that yes or no.

A. I do.

Q. Is it good or bad? A. Pretty rotten.

Q. Would you believe him under oath? A. No.

Mr. Sullivan: That is all. Thank you.

The Court: Cross examine.

Cross Examination

By Mr. Neukom:

Q. Mr. Skill, Mr. Tomsone was a young man working for you in 1934 and you sent him with some shoes to another place of business to pick up a check, didn't you?

A. That isn't so.

Q. You did send him to a place of business to pick up [287] a check?

A. That isn't so. That is a lie.

Q. You don't like Mr. Tomsone, do you?

A. Yes, I liked him. I liked him so much that I had him in my house and treated him like a son until he proved what rat he was.

Q. You went and had him arrested, didn't you?

A. I had him arrested.

Q. And as a result of your arrest he served 20 days in jail, didn't he? A. He did.

Q. And that was purely because you complained against him, wasn't it?

A. Complained against him?

Q. Yes. A. I caught him—

(Testimony of Fred Skill)

The Court: Just a moment. You answer the question. Was it because you complained against him?

A. Why, of course.

By Mr. Neukom:

Q. You don't know where Mr. Tomsone went after he left Long Beach after that, do you?

A. I don't know what?

Q. He left Long Beach after that, didn't he?

A. Yes. [288]

Q. And you don't know where Mr. Tomsone lived after that, do you? A. No.

Q. You don't know where he lives now, do you?

A. I never inquired.

The Court: You have never seen him since 1934?

The Witness: No.

The Court: Or talked to him?

The Witness: No.

The Court: Or heard about him?

The Witness: No.

By Mr. Neukom:

Q. You haven't heard anyone in the community where he now resides ever discuss his character, have you?

A. I haven't heard a thing.

Q. Nor have you heard anyone—

The Court: Just a moment. The witness' testimony is stricken and the jury is instructed to disregard it on the Court's own motion, on the ground that it is too remote.

Mr. Sullivan: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Sullivan: Mr. Curry.

ALLEN E. CURRY,

called as a witness by and in behalf of the defendant, having [289] been first duly sworn,* was examined and testified as follows:

The Clerk: Your name?

The Witness: Allen E. Curry.

The Clerk: Your address?

The Witness: 670 Shatto Place.

The Clerk: Los Angeles?

The Witness: Los Angeles.

Mr. Neukom: Your Honor, I cannot anticipate what a witness is going to say, but if the bell is rung once it is sometimes rung again and even the instruction or admonition of the court does not cure it. If this is to be of the same character of testimony, I think some inquiry ought to be had from the Court before the conclusion of the witness has been had.

The Court: Will counsel approach the bench?

(The following proceedings were had between Court and counsel at the bench outside the hearing of the jury:)

The Court: What do you propose to do, use him as a character witness?

Mr. Sullivan: As a character witness, your Honor. Also I propose to show by him that he had some shoes made by him and that while he was required under the contract to make a cast he never made a cast of this man's foot before making these shoes.

The Court: As a character witness, that will not be too [290] remote?

Mr. Sullivan: No. It will be within the last year, 18 months or two years.

(Testimony of Allen E. Curry)

Mr. Neukom: I didn't know that this was that witness. I knew you had some others from Long Beach.

The Court: Proceed.

(The following proceedings were again had in open court:)

Direct Examination

By Mr. Sullivan:

Q. Mr. Curry, what is your business or occupation, please? A. I am a jeweler, hand-made jeweler.

Q. Are you a veteran?

A. I am a campaign Marine from Haiti and Dominican Republic.

Q. Are you connected with any veterans' organizations?

A. I am very much so, the Veterans of Foreign Wars of the United States.

Q. In what capacity are you connected with them?

A. I am Past Post Commander; also Past Commander of the Military Order of the Cooties, Pup Tent No. 20, the Honorable Degree of the Veterans of Foreign Wars; also Chief of Staff of the Fifth District of the Veterans of Foreign Wars.

Q. Are you acquainted with Mr. Hubert Tomsone?

A. I am. [291]

Q. How long have you known Mr. Tomsone?

A. I have known Mr. Tomsone since around—I can't recall the exact date, but I think when he went to work for Mr. Woods, the shoe man out just off of Venice Boulevard—in around 1938 or '39.

Q. Have you know him since that time?

A. Ever since that time; yes.

Q. Down to the present time?

A. That is right.

(Testimony of Allen E. Curry)

Q. Are you also acquainted with other people or veterans who have become acquainted with Mr. Tomsone?

A. Yes, I am. I have had quite a lot of veterans come to me with stories that they can't get shoes to fit them and what can they do about it.

Mr. Neukom: Just a moment.

Mr. Sullivan: Don't tell us what they said.

The Court: The jury is instructed to disregard that. If that is impeachment—

The Witness: They came to me—

The Court: Just a minute.

Mr. Sullivan: Just a minute.

Q. I just want you to tell if you are acquainted with other people who know Mr. Tomsone. A. Yes.

Q. At the present time? [292] A. Yes.

Q. Are you familiar with Mr. Tomsone's general reputation in the community in which he resides for truth, honesty and integrity.

The Court: Answer yes or no.

The Witness: I can't your Honor.

The Court: What is that?

The Witness: I can't answer that directly yes or no. I can answer it in the place of business but not where he resides at his home.

The Court: That is deemed to be his place of residence, I mean the business community is a man's residence.

The Witness: Yes, sir.

By Mr. Sullivan:

Q. Is it good or bad?

A. It is bad, very bad.

Q. Would you believe him under oath? A. No.

(Testimony of Allen E. Curry)

Q. Now, Mr. Curry, have you ever had occasion to procure from the Veterans Administration at Sawtelle a prescription or order for any orthopedic shoes to be made by Mr. Tomsone? A. Yes.

Q. Do you have a pair of his shoes on at the present time? [293] A. I have now; yes.

Q. The shoes which you are wearing now, were they made by Mr. Tomsone?

A. They were made by Mr. Tomsone about a year ago. Do you want to see them?

Q. Don't take them off now. Just hold them there a minute.

Was that the first pair of shoes that Mr. Tomsone ever made for you?

A. In his own shop; yes. He made others in other places.

Q. You say those shoes were made by him about a year ago? A. They were made in his shop.

Q. In his shop? A. Yes.

Q. Upon a prescription or order given you by the Veterans Administration to take to him and have the shoes made, is that correct? A. That is correct.

Q. Now on that occasion did Mr. Tomsone make any plaster cast of your feet? A. He did not.

Mr. Neukom: Now, your Honor, are we going to try the shoes in this case? I think that this is entirely collateral- [294] al to go into these individual complaints or affirmations of quality on all of these shoes that Mr. Tomsone may or may not have made. Dr. Gage has testified that he treated from, I think, 30 to 40 people a day. I think that this is entirely collateral to the case, to go into various complaints about some particular shoes,

(Testimony of Allen E. Curry)

and your Honor I believe is even under a duty to advise this jury with regard to the provisions of this contract, the approval features of this contract. We haven't requested it, but I think this is entirely collateral, and I object to it.

The Court: I do not see how this would be admissible, counsel. The contract is made and is a valid contract. We are not here trying the validity of the contract. We are not here trying the contractor or either party to it or their failure to live up to the contract. I do not see how this could possibly enter into the intention or the conduct of the defendant, which is the only way it would be admissible. Whether he made a plaster cast or he didn't make a plaster cast, the contract says that he will make it upon prescription. The doctors who have been on the witness stand have testified that they gave the prescription and approved the shoes, that before the shoes were accepted they had to be approved by the doctor. So I do not see how this can go to any of the material elements of this case. Whether he made a plaster cast or did not make a plaster cast of this man's [295] foot, whether it was required or not required, it was not for Tomsone or this witness to determine but was for the doctor, under the testimony here, to determine.

Mr. Sullivan: Your Honor, it was a requirement under the contract.

The Court: If the doctor accepted the shoes without a plaster cast, why that apparently was his prerogative, at least that is the testimony here.

Mr. Sullivan: All right, your Honor.

The Court: So I do not believe that that line of testimony would be admissible.

(Testimony of Allen E. Curry)

Mr. Sullivan: I will not pursue it any further in view of your Honor's ruling.

I have no further questions of this witness.

Cross Examination

By Mr. Neukom:

Q. What did you say you belonged to?

A. Veterans of Foreign Wars of the United States.

Q. What else?

A. Military Order of the Cooties, Honorary Degree of the Veterans of Foreign Wars.

Q. What else? A. I am a jeweler.

Q. You had an argument with Mr. Tomsone some time ago because you wanted him to make you two-tone shoes, didn't [296] you? A. No, that is not true.

Q. Didn't you ask him to make you some two-tone shoes? A. No; never.

Q. In fact, you asked him to make black and white shoes?

A. I never asked him to make two-tone shoes.

Q. You don't like Mr. Tomsone?

A. I have nothing against the man personally.

Q. Will you tell me where his place of business is?

A. On West Seventh Street.

Q. How long have you known it to be there?

A. Well, for the past—I knew him out in Southgate when he was out there and he came down here. I don't recall when he moved down here at all.

Q. Have you been in his shop on West Seventh Street?

A. Yes, plenty of times.

Q. What is its address?

A. I couldn't tell you the address. I know where it is at.

(Testimony of Allen E. Curry)

Q. Will you tell me one person in that community who has discussed with you Mr. Tomsone's reputation for truth and honesty?

A. The man in the drugstore there. I went in there one day when Mr. Tomsone made an appointment with me and re- [297] fused to keep it, because he was very conveniently absent at that time, and I went in to get a cup of coffee while I was waiting for Mr. Tomsone, and he asked me what I was doing in the neighborhood there. We got to talking and I said, "I am going over here to Hubert's shoe company to get a pair of shoes."

He said, "He is not very well liked, is he?"

I said, "Well, I don't know. What makes you think that? After all, I never condemn a person until I am sure."

And he said, "Well, after all, I sit in here and I see veterans come in here to wait for him, and he makes appointments and never shows up. He makes them a lot of rash promises and never intends to keep them. My own experience is—"

Q. Just a moment. I asked you about the druggist. What is this druggist's name?

A. I don't know the man. Just from walking in and sitting down and getting a cup of coffee.

Q. When did this take place?

A. This took place when I was getting this pair of shoes made.

Q. About what was the date?

A. I have no idea what the date was. It is about a year ago or so.

(Testimony of Allen E. Curry)

Q. Then this druggist told you that he wouldn't believe Mr. Tomsone, that Mr. Tomsone was not honest and was [298] not truthful?

A. He said he made a lot of promises, and veterans would come in there a lot of times.

Q. You had never seen this druggist before?

A. I had never seen him in my life.

Q. And you started right away to talk about Mr. Tomsone's reputation?

A. We didn't start talking about it right away, no. I walked in there to get a cup of coffee and then we got in the course of a conversation.

Q. As a matter of fact, you were pretty irked then at Mr. Tomsone, weren't you?

A. No, not necessarily.

Q. You didn't like him very well, did you?

A. Except that we had a lot of arguments, the same as I have with a lot of shoe men who I have had arguments with.

Q. Oh, you have had arguments with other shoe men?

A. Definitely.

Q. Then Mr. Tomsone isn't the only one?

A. That is right.

Q. In fact, you have had arguments with a lot of people in your life, haven't you?

A. Yes, that is right.

Mr. Neukom: That is all.

Mr. Sullivan: That is all. [299]

The Court: Mr. Witness, is this the only pair of shoes Mr. Tomsone ever made for you?

The Witness: No, sir.

The Court: How many other pairs has he made?

(Testimony of Allen E. Curry)

The Witness: At Wood's Shoe Company I believe he made three pair of shoes before he got one that I could put on my feet to wear across the room.

The Court: How many pairs has he made for you?

The Witness: That is the extent of it.

The Court: For how long a time?

The Witness: That is about since '37 or '38.

The Court: You have been wearing his shoes ever since?

The Witness: No. I have shoes made on other contracts.

The Court: Very well. Step down.

(Witness excused.)

The Court: Next witness.

Mr. Sullivan: Mr. Kancheff.

CARL KANCHEFF,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Carl Kancheff.

The Clerk: How do you spell your last name?

The Witness: K-a-n-c-h-e-f-f.

The Clerk: Your address? [300]

The Witness: 320 South Fremont Avenue.

The Clerk: Where?

The Witness: Los Angeles.

The Clerk: Take the stand.

(Testimony of Carl Kancheff)

Direct Examination

By Mr. Sullivan:

Q. What is your business or occupation, Mr. Kancheff?

A. I am an apprentice jeweler.

The Court: Speak a little louder, if you can.

The Witness: I will try:

Mr. Sullivan: His answer was apprentice jeweler.
Try and keep your voice up so the jurors may hear you.

Q. Are you acquainted with Mr. Hubert Tomisone?

A. Yes, I am.

Q. How long have you known Mr. Tomisone?

A. I can't be definite, but close to a year.

Q. During the past year approximately?

A. Yes.

Q. Are you acquainted with other people that know him in this community?

A. I have talked to other veterans that know him.

Q. Are you familiar with his general reputation for truth, honesty and integrity in the community in which he resides or has his business?

A. Well, does that take in Sawtelle and that area or [301] just in the local community?

Q. He does business out at Sawtelle, doesn't he?

A. Yes, I am.

Q. What is it, good or bad? A. Bad.

Q. Would you believe him under oath? A. No.

Mr. Sullivan: That is all.

The Court: Cross examine.

(Testimony of Carl Kancheff)

Cross Examination

By Mr. Neukom:

Q. What is your name? A. Kancheff.

Q. Until an investigator from Mr. Sullivan's office came and talked to you and asked you whether or not you would be a witness, you hadn't given this type of matter very much thought, had you, Mr. Kancheff?

A. I had given it very much thought.

Q. You were not subpoenaed to come here?

A. I was subpoenaed.

Q. You were not talked to before you came here?

A. I ran into the investigator quite by chance.

Q. You ran into him by chance? A. Yes.

Q. That was because you had some hard feeling against [302] Mr. Tomsone that you wanted to come here and testify?

A. At first it had nothing to do at all with Mr. Tomsone.

Q. What did it have to do with?

A. I was thinking of going into the Veterans of Foreign Wars.

Q. A little louder, please.

A. I was thinking of going into the Veterans of Foreign Wars, and while talking to Mr. Curry I met Mr. Sullivan.

Q. Mr. Curry is the one that asked you to come down and testify?

A. No one asked me to come down and testify. I volunteered to testify.

Q. You volunteered? A. Yes.

(Testimony of Carl Kancheff)

Q. Now isn't it true that unfortunately because of your ailments that you weren't able to walk until Mr. Tomsone made you some pairs of shoes?

A. I was walking just as well before I got the shoes as after.

Q. He has made you two pair of shoes?

A. He has made me two pair of shoes; yes.

Q. And both of those shoes that you received were approved by the doctor before you accepted them, weren't they?

A. Not to my knowledge. [303]

The Court: You mean you don't know?

The Witness: I really don't know.

By Mr. Neukom:

Q. You are wearing a pair of them today, aren't you?

A. Yes, I am.

Q. Do you know where Mr. Tomsone's business is?

A. Yes, I do.

Q. Do you know anyone in that neighborhood that you have ever discussed his reputation with?

A. No, I have never been in that neighborhood except to go to his shop.

Q. You have only known him for a year?

A. That is about right.

Q. You don't know where he lives, do you?

A. No, I don't.

Q. Do you know anyone in the neighborhood where he lives that has ever discussed his reputation with you?

A. No.

Q. Mr. Kancheff, isn't it true that you are just a little bit irked, and for that reason you are saying that Mr. Tomsone shouldn't be believed?

A. I can give a very good reason.

(Testimony of Carl Kancheff)

Q. Has anybody told you they wouldn't believe Mr. Tomsone excepting Mr. Curry? A. Yes. [304]

Q. Who besides him?

A. Other veterans I have talked to at Sawtelle.

Q. They have come forward and told you, you just started to talk about your not going to believe Mr. Tomsone, is that right? A. No.

Q. Isn't it true that frequently veterans who have a lot of time on their hands frequently gripe a lot?

A. That is true in the army and among veterans.

Q. And this was just the usual gripes that you have about the whole spirit of the thing, isn't that right?

A. No.

Q. Isn't it true, Mr. Kancheff, that it is kind of inconvenient to have to go all the way out there to Sawtelle and to have to wait around and wait your turn and as a result of that you get irked and you take your blames out on anybody that comes into your mind?

A. I wouldn't say that.

Mr. Neukom: That is all.

Mr. Sullivan: That is all.

The Court: Mr. Tomsone made the first pair of shoes you had?

The Witness: Yes, he did.

The Court: Up to that time you had to wear bedroom slippers? [305]

The Witness: Yes, sir.

The Court: So nobody else has ever made any shoes for you?

The Witness: No, sir.

The Court: You may be excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Sullivan: Has Mr. Nie come in? (No response.)

The Court: No one responded.

Mr. Sullivan: Is Mr. Chapman here?

LEICESTER C. CHAPMAN,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: L. C. Chapman.

The Clerk: What is your first name?

The Witness: Leicester; L-e-i-c-e-s-t-e-r.

The Clerk: Your address?

The Witness: Veterans Administration, Los Angeles.

Direct Examination

By Mr. Sullivan:

Q. Mr. Chapman, what is your business or occupation, please?

A. I am manager of the Regional Office of the Veterans Administration in Los Angeles. [306]

Q. Is that the Veterans Administration commonly known as Sawtelle? A. No, sir.

Q. Are you downtown? A. Partially.

Q. You also have an office out at Sawtelle?

A. Yes, sir.

Q. You spend part of your time in the downtown office and part of your time out there, is that correct?

A. Yes, that is correct.

Q. And during the month of October 1946 were you spending part of your time downtown and part out there?

A. That is right.

(Testimony of Leicester C. Chapman)

Q. How much of your time did you spend downtown during the month of October 1946?

A. I have no idea.

Q. Was it your practice to spend certain days in the Sawtelle office and certain days downtown, or did you spend parts of each day at each office?

A. Sometimes I was all day at one place, sometimes all day at the other, and sometimes in between.

Q. Sometimes you would be in one place part of the day and the other place part of the day?

A. That is right.

Q. Do you recall whether you were at your office on [307] October 18, 1946? Does that date mean anything to you?

A. No, sir.

Q. You have no independent recollection of that particular date?

A. No, sir.

Q. Directing your attention to Dr. Gage, the gentleman seated at the counsel table here, are you acquainted with him?

A. Yes, sir.

Q. Do you know approximately when you first became acquainted with Dr. Gage?

A. I couldn't give the date. He came to my office to see me. I believe it was early in October.

Q. Do you recall when he came to your office he had with him a written request for resignation?

A. He said he had. I did not see it. I don't remember.

Q. You didn't actually see the papers then?

A. I don't recall seeing them; no sir.

(Testimony of Leicester C. Chapman)

Q. You don't recall today having seen them at that time?

A. My recollection is that during the conversation he reached for them in among some other papers and I don't know whether he said he had them or whether he left them.

Q. Did you have some discussion with him that time about his wanting to resign? A. Yes, sir. [308]

Q. Can you recall what was said by him or by you at that time?

A. He said quite a good deal. Generally I think it was to the effect that he was thinking of resigning, in fact, had signed his resignation, I believe he said, but that he wanted to talk to me about it before submitting it, and I believe finally he said that he liked the work and would like to stay in it, and I suggested in that case that he not resign.

Q. Do you recall anything else that was said at that time?

A. Yes. He talked to me about some of this difficulties with other doctors, I believe. I recall one particular thing he said was that all cases were referred to him, that if anything involving a bone in it they called the orthopedist and sent it to him, and he told me about a case that some other doctor had been treating for some time, not knowing what was the matter with the man, and when he finally sent him to him he discovered he had a sarcoma of the knee. I don't remember whether he said he operated or had somebody else operate or what was done about it.

He talked to me at length about the orthopedic contracts, particularly I believe with reference to legs and arms. He spoke of the Milligan Company and their rep-

(Testimony of Leicester C. Chapman)

representative, Mr. Brown I believe, and his effort to get those people to put on display at our place samples of their products in order that [308] the men might be able to make a selection without having to go all over Los Angeles.

He mentioned one case which I took note of and had investigated later, having to do with a man, I believe, who had a leg made by someone other than Milligan and claimed that he was told by the clerk in the orthopedic office that the repair of that leg would have to be made by Milligan, and the man apparently objected to that. There were probably one or two other specific complaints mentioned, I believe. I believe he mentioned the fact that he had of necessity turned down some men for orthopedic shoes, I believe, who previously had been getting or wearing shoes and that in so doing he was saving the Government a good deal of money out of it all.

Q. Do you remember whether he mentioned the party's name?

A. I might add that he stated that he felt that the previous authorizations for those shoes were not proper. In other words, many men were wearing orthopedic shoes who should have had insoles or something of that kind.

Q. Well, as a result of his conversation with you, did you state anything to the effect that he would think the matter over further?

A. That was my understanding when he left, was that he was not going to resign immediately.

Q. Was that the only time, as you now recall, that he [309] ever came and talked with you there?

A. Yes. I have seen him but not in my office.

(Testimony of Leicester C. Chapman)

Q. You think that was the only time that he ever came to your office, as far as you recall?

A. That is right.

Mr. Sullivan: Thank you, Mr. Chapman.

The Court: Cross examine.

Mr. Neukom: Your Honor, I have subpoenaed Mr. Chapman and the defense subpoenaed Mr. Chapman. Maybe we can let him go tonight if I can go over my notes.

The Court: You mean you are not going to finish this case tonight? How many witnesses have you left?

Mr. Sullivan: This will be my last one.

Mr. Neukom: I may go into matters that would not be proper matters of cross examination.

Mr. Sullivan: I won't object if you do. I won't confine you to the cross examination of his direct testimony, as far as I am concerned.

Cross Examination

By Mr. Neukom:

Q. This Milligan contract for legs and arms, this wasn't Tomsone's contract, was it? A. No, sir.

Q. That is a special deal entirely, wasn't it?

A. Oh, yes. [310]

Q. During the conversation, Mr. Chapman, do you remember whether or not Dr. Gage made any mention of Mr. Tomsone having put his check book on his desk and telling you about that incident? A. No, sir.

Q. During the conversation with you, Mr. Chapman, did Dr. Gage make any complaint as to the quality or character of the work being performed by Mr. Tomsone?

The Court: What was the answer?

The Witness: No, sir.

(Testimony of Leicester C. Chapman)

By Mr. Neukom:

Q. There has been some testimony here by Dr. Gage to the effect that you told Dr. Gage that a doctor had committed suicide as a result of an investigation being conducted at the Facilities. Did you so state to Dr. Gage when you were talking to him? A. No, sir.

Q. Just what did you say, if anything, with regard to any such incident?

A. We were discussing the Milligan and the other arm and leg contractors, and Dr. Gage, in the course of the conversation, indicated that as a result of Mr. Brown, who represented Milligan, refusing to agree to this plan I mentioned a while ago of putting their product on display at our place, that Dr. Gage indicated that he thought as a re- [311] sult of that, and some other things, that there was something maybe wrong in connection with the Milligan contract, the amount of work they got as compared to others, I believe.

At that time I mentioned the fact to Dr. Gage that sometime in the past, when I was stationed here for six years, that question had continuously arisen, we had investigated it repeatedly, and we had never been able to get any definite facts on the matter; and mentioned, I believe, that the last doctor who had been under investigation in connection with the matter had subsequently been transferred to Florida, and I had heard since my return that he had committed suicide.

Q. That was an incident that occurred a number of years ago?

A. I have heard since I came back. I don't know when it happened.

(Testimony of Leicester C. Chapman)

Q. So it is clear then that the arms and legs have nothing to do with the foot contract, the Milligan and the foot contract with Tomsons are entirely distinct?

A. That is my understanding.

Mr. Neukom: That is all.

Mr. Sullivan: That is all. Thank you, Mr. Chapman.
(Witness excused.)

Mr. Sullivan: Might we have one other short witness?

The Court: All right.

Mr. Sullivan: Dr. Townsend. [312]

KENNETH TOWNSEND,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Kenneth Townsend.

The Clerk: Your address?

The Witness: 9949 Santa Monica Boulevard, Beverly Hills.

The Clerk: Take the stand.

Direct Examination

By Mr. Sullivan:

Q. What is your business or profession, Doctor?

A. Physician and surgeon.

Q. Where do you reside?

A. I reside at 712 North Fairfax in Los Angeles, my business being in Beverly Hills.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I am.

(Testimony of Kenneth Townsend)

Q. How long have you known Dr. Gage?

A. Approximately a year.

Q. Were you acquainted also with other people that know him in the vicinity in which he lives?

A. I am.

Q. Are you familiar with his general reputation for honesty and integrity and as a law-abiding citizen? [313]

A. I am.

Q. Is it good or bad?

A. To my knowledge it is good.

M. Sullivan: Thank you. That is all.

Mr. Neukom: That is all.

The Court: You may be excused.

(Witness excused.)

Mr. Sullivan: Your Honor, I have found that Dr. Nie has come into the courtroom.

ARTHUR J. NIE,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Arthur J. Nie; N-i-e.

The Clerk: Your address?

The Witness: 1050 Marco Place, Venice.

The Clerk: Take the stand.

Direct Examination

By Mr. Sullivan:

Q. Mr. Nie, what is your business or occupation, please?

(Testimony of Arthur J. Nie)

A. I am medical administrative officer of the Medical Division of the L. A. V. A. Regional Office.

The Court: What is the "V. A."?

The Witness: Veterans Administration. [314]

By Mr. Sullivan:

Q. Located at Sawtelle? A. That is right.

Q. How long have you been employed there in that capacity? A. Since August 29 of this year.

Q. Were you employed there in that capacity during the month of October 1946? A. I was.

Q. Now in connection with your employment there, did you become acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table over here?

A. I did.

Q. Did you ever have any conversation with Dr. Gage in respect to his wanting to resign?

A. Yes, on at least two occasions.

Mr. Sullivan: May we offer in evidence this Defendant's Exhibit A, your Honor?

Mr. Neukom: I have no objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

By Mr. Sullivan:

Q. I will show you, Mr. Nie, Defendant's Exhibit A which purports to be a form of written request for resignation. [315]. Is that the form that is used out at the Veterans Administration there?

A. That is the proper form.

Q. And is this your signature, Arthur J. Nie?

A. That is my signature.

(Testimony of Arthur J. Nie)

Q. And the date here, October 2, 1946, you observe that date? A. Yes.

Q. Did you have some discussion with Dr. Gage on or about that date in relation to his contemplated resignation?

Mr. Neukom: Your Honor, I am going to object to any additional testimony.

Mr. Sullivan: I won't ask him. I am not going into the nature of the conversation. I just want—

The Witness: Would you repeat the question?

The question referred to was read by the reporter, as follows:

(“Q. Did you have some discussion with Dr. Gage on or about that date in relation to his contemplated resignation?”)

By Mr. Sullivan:

Q. (Continued) Just answer it yes or no.

A. Yes.

Q. As a result of your discussion with him, did you make any suggestion to him that he talk to anyone else about the matter? [316]

A. Dr. Gage asked what the procedure was. I told him that the next procedure for him to do was to go to employee relations, which is the routine procedure. A discussion came up as to whether he might see the manager, and I advised him that I had been told that the manager had an open-door policy with all employees, and that any employee that wanted to see the manager could see the

(Testimony of Arthur J. Nie)

manager, and it was my understanding that he was going over to personnel after this discussion.

The Court: Is that all the conversation?

The Witness: On that particular date.

The Court: About this subject?

The Witness: Of resigning?

The Court: Of resigning.

The Witness: On that particular date we talked probably for 5 or 10 minutes, but I don't recall anything particular in our conversation other than the discussion as to what he was entitled to do and what he was authorized to do in relation to submitting a resignation, which he told me he wanted to submit.

By Mr. Sullivan:

Q. Did you send him then from your office to see him?

A. He was advised to go to the V. A. Regional Office, that is our offices in the Wadsworth General Hospital, and he was advised to go over to the Regional Office, which is several blocks away on Sepulveda. [317]

Mr. Sullivan: That is all I have.

Mr. Neukom: No questions.

(Witness excused.)

Mr. Sullivan: We will rest.

The Court: The defendant rests.

Any rebuttal?

Mr. Neukom: Yes, your Honor.

Dr. Long, please.

FRANK L. LONG,

recalled as a witness by and in behalf of the Government in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: You have been sworn before?

The Witness: Yes, sir.

Direct Examination

By Mr. Neukom:

Q. Dr. Long, at any time that Dr. Gage talked to you did he in any of those conversations report to you that the work done by Mr. Tomsonsone was inferior and of poor quality?

A. He did not. His point was that they should have another contract so a fellow would have a choice of more than one. He never complained about the particular work that I can recollect.

Q. Any time that Dr. Gage talked to you, did he tell you that Mr. Tomsonsone was making approaches to him that he [318] thought were irregular?

A. He never discussed that with me at all.

Q. At any time that he talked to you, did he ever tell you that Mr. Tomsonsone had offered to allow him, Dr. Gage, to make out a check?

A. I never heard of it. He never did.

Q. Was there any discussion that Mr. Tomsonsone had ever offered him a check?

A. No, sir; there was none.

(Testimony of Frank L. Long)

The Court: Or money?

The Witness: There was none.

By Mr. Neukom:

Q. Did you talk to him upon more than one occasion, Dr. Long, while he was there? A. Who was that?

Q. Dr. Gage.

A. Yes, he come to me on one other occasion about the leg contracts.

Q. We won't go into that.

A. I know, but he talked about that and we had some discussion about that on two or three occasions.

Q. Is your office available to him if he cared to discuss anything with you?

A. The door is always open; it is never closed.

Q. Was that true during the month of October? [319]

A. It was.

Q. And you were at the Facility, to the best of your recollection, each of the open days during the month of October?

A. I might have visited one of the other sub-regional offices during that month, I am not sure. I think it was September though, and I believe I was there every day of October.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

(Witness excused.)

Mr. Neukom: Mr. Davis, will you take the stand?

HOWARD H. DAVIS,

called by and in behalf of the Government in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Neukom:

Q. After you had arrested Dr. Gage, about what *your* was it when you started from Sawtelle towards the FBI?

A. I would say approximately 3:50 to 4:00 o'clock.

Q. And Sawtelle is about 17 miles or more from the FBI office at Fifth and Spring?

A. Somewhere between 15 and 17 miles, I would say.

Q. And you drove in there?

A. We drove in; that is right. [320]

Q. Dr. Gage was taken to the office? A. Yes.

Q. Did you accord him the opportunity of using the telephone?

A. He said he would like to use the telephone, and he was so allowed.

Q. Did he call more than one person while you were there? A. I know of two calls that he made.

Q. Did he discuss or state to you that he had received a call from Mr. Ward Sullivan while he was there?

A. I don't believe he received one from him. Mr. Malloy received one.

Q. While he was at the office, did you hear his end of the conversation talking to one by the name of Sally?

A. I did.

Q. Prior to that, had he stated whom he wished to call? A. His wife, at the William Tell Motel.

Q. Did a call come through?

A. That is correct.

(Testimony of Howard H. Davis)

Q. You didn't hear who was on the other end of the line?

A. I couldn't hear what was being said on the other end of the line.

Q. What did you hear Dr. Gage say, if anything? [321]

A. He started out by telling his wife that he had been arrested by the FBI and not to get excited, and then while apparently the other person was talking, after that he said, "Yes, I took that money." Then there was more conversation apparently between the two—I could not understand both ends of it naturally—and he said, "I can't tell you that over the phone."

Q. When he was arrested, when you entered the room where Dr. Gage was just prior to the finding of the money, what badge, if any, did you show?

A. The regular Bureau badge, the Bureau badge which I have carried for some time, ever since I have been in the service of the Federal Bureau of Investigation.

Q. Does it say on it "Federal Bureau of Investigation, Department of Justice"? A. It does.

Q. Did you have any Forestry badge with you?

A. I am unauthorized to carry any badge—

Q. My question was, did you have one.

A. I did not.

Mr. Neukom: I don't wish to take this away, and with the consent of the Court I would like to read from it. Is there any objection?

Mr. Sullivan: I have no objection.

Mr. Neukom: "Federal Bureau of Investigation, United [322] States Department of Justice."

(Testimony of Howard H. Davis)

I would put it in evidence, but I thing this gentleman may need it for his duties.

That is all.

Mr. Sullivan: I have no questions.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

Mr. Neukom: Mr. Duncan, please.

CHARLES M. DUNCAN,

called as a witness by and in behalf of the Government in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Neukom:

Q. Mr. Duncan, in the course of your investigations on this Gage matter, did you have occasion to observe Dr. Gage on or about October 10, 1946 in the shoe shop, or the shop of Hubert Tomson at 1207, I believe it is, West Seventh Street, Los Angeles? A. Yes, I did.

Q. Just relate what you saw, about what time of the day it was and what you saw.

A. I arrived at Mr. Tomson's shop at approximately 10:00 or 10:15 a. m., and at approximately 11:00 a. m. Dr. [323] Gage entered the shop with Mrs. Gage.

Q. With Mrs. Gage, his wife? A. Yes, sir.

Q. Is that the only occasion you saw them there?

A. Yes.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

(Witness excused.)

Mr. Neukom: Mr. Harder.

JOHN HARDER,

called as a witness by and in behalf of the Government in rebuttal, being first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: John Harder; H-a-r-d-e-r.

The Clerk: Your address?

The Witness: 1423 Ridgeway.

Direct Examination

By Mr. Neukom:

Q. Do you know Mr. Tomsone? A. I do.

Q. How long have you known him.

A. About eight years.

Q. Whereabouts?

A. Socially. His wife is employed by me and we have [324] known each other socially, going out together on double dates, our wives and ourselves and friends. We have been at each other's homes off and on during the last eight years.

Q. Has that occurred of late, the last few years?

A. Yes, it has.

Q. Do you know the general reputation—by the way, where is your business?

A. On 720 South Hill Street.

Q. Do you know where Mr. Tomsone's place of business is? A. I do.

Q. And that is about 1207 West Seventh Street?

A. That is right.

Q. Is that a few blocks away from your place of business? A. About five or six blocks.

(Testimony of John Harder)

Q. Do you know Mr. Tomsons's general reputation—

A. I do.

Q. Just allow me to finish, please.

A. Pardon me.

Q. —for truth and honesty and integrity, first in the community in which he lives?

A. I don't know the community in which he lives.

Q. All right. In the business community.

A. One person that he does business with. [325]

Q. Do you know his reputation?

A. I have heard this person express it.

Q. What is his reputation for truth, honesty and integrity?

A. He told me he was a pretty good man to do business with.

The Court: You can answer the question as to whether it is good or bad.

The Witness: It is good.

Mr. Neukom: That is all.

Cross Examination

By Mr. Sullivan:

Q. Mr. Harder, you say that you have known Mr. Tomsons for about a year? A. About eight years.

Q. And that you and your wife and Mr. Tomsons and his wife go out socially quite often? A. We have.

Q. Is that right? A. That is right.

Q. But you are not familiar with his reputation for truth, honesty and integrity in the community in which he

(Testimony of John Harder)

resides, but you are familiar with it in the community in which he does business, is that correct?

A. I know one person that he does business with. [326]

Q. Just one? A. Yes. That is a friend of mine.

Q. Who is that?

A. He is the owner of a leather company, or one of the partners in Wyckoff Leather Company.

Q. What is his name?

A. Willard Bitner, B-i-t-n-e-r.

Q. Is he the only person that you know who has done business with Mr. Tomsone?

A. As far as I know, yes.

Q. And was it from Mr. Bitner that you learned what Mr. Tomsone's reputation for truth, honesty and integrity was? A. I have heard him express it; yes.

Q. You have heard Mr. Bitner express it?

A. Yes.

Q. Were you discussing Mr. Tomsone with Mr. Bitner? A. I think it was brought up; yes.

Q. Do you know whether it was or was not?

A. It was.

Q. Where was the occasion of discussing Mr. Tomsone with Mr. Bitner?

A. Mr. Bitner has been recently in the leather business and he is a close friend of mine, and I said, "Did you ever do any business with Hubert?" and he said, "I have occasionally, yes." [327]

Q. What else did he say about that?

A. And I said, "How come you don't sell any more stuff?"

(Testimony of John Harder)

He said, "We don't have too much of what he wants."

I said, "Do you get along with him?"

He said, "Yes."

Q. Did you say anything else?

A. That is all that I remember.

Q. That was all that was said about him?

A. Yes.

Q. You had no further discussion with Mr. Bitner about Mr. Tomsone?

A. Other than he knows Mr. Tomsone also in a friendly way. We discussed friends. We talked about him.

Q. But you have now told us as near as you can recall everything that was said between yourself and Mr. Bitner in relation to Mr. Tomsone's reputation for truth, honesty and integrity, is that correct?

A. In a business way; yes.

Q. And you haven't discussed that with any other person that he does business with?

A. I don't know anyone else that he does business with.

Mr. Sullivan: That is all.

Redirect Examination

By Mr. Neukom:

Q. When I state "community" to you in asking you, you [328] have known friends of Mr. Tomsone here in Los Angeles? A. I have what?

Q. You have known friends of Mr. Tomsone's in Los Angeles?

A. Yes, I have. I thought you meant where he lives.

(Testimony of John Harder)

Q. We will consider Los Angeles a community.

A. Yes.

Q. Not just the actual home place. You have known people that know him intimately? A. Yes.

Q. Is his general reputation among those people for truth, honesty and integrity good or bad? A. Good.

Q. Have you ever heard anyone discuss unfavorably his reputation? A. I never have.

Mr. Neukom: That is all.

Recross Examination

By Mr. Sullivan:

Q. Who among his friends have you heard discuss his general reputation for truth, honesty and integrity?

A. We have never brought it up as an issue; no.

Q. You have never discussed it with any of his friends?

A. We have discussed Hubert and we would say, "He is a pretty nice fellow." [329]

Q. They say he is a pretty nice fellow? A. Yes.

Q. But you never discussed with any of his friends his reputation for truth, honesty and integrity?

A. I never asked anyone in those words; no. I usually don't do that with my friends.

Mr. Sullivan: That is all. No further questions.

The Court: You may be excused.

(Witness excused.)

Mr. Neukom: Pete Latora.

PETE LATORA,

called as a witness by and in behalf of the Government in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Pete Latora; L-a-t-o-r-a.

The Clerk: Your address?

The Witness: 1835 West 88th Place.

The Clerk: Take the stand.

Direct Examination

By Mr. Neukom:

Q. How long have you known Mr. Tomsone?

A. About 12, 13 years.

Q. Have you known him intimately?

A. Yes. [330]

Q. Here in Los Angeles? A. Yes.

Q. Have you known him socially? A. Yes.

Q. Have you know him well in the last few years?

A. Very well; yes.

Q. Have you gone out with friends of his?

A. Most with his family, his wife and him.

Q. Do you know other friends of his?

A. Yes, sir.

Q. Do you know people with whom he does business?

A. Well, leather houses; yes.

Q. What business are you in?

A. Right now I am in a used car lot, salesman.

Q. Were you formerly in any other business?

A. Yes, shoe repair business.

(Testimony of Pete Latora)

Q. Did you work with Mr. Tomsone?

A. Well, I did about three or four years ago, just parttime.

Q. Did you work with concerns that he did business with? A. No.

Q. Do you know his general reputation in this community of Los Angeles for truth and honesty?

A. Yes. [331]

Q. What is it? A. Good.

Q. Have you ever heard his reputation for truth and honesty discussed in an unfavorable way?

A. No, sir.

Mr. Neukom: That is all.

Cross Examination

By Mr. Sullivan:

Q. With whom have you ever discussed Mr. Tomsone's reputation for truth and honesty? A. Yes.

Q. Whom did you ever talk it over with?

The Witness: Talked about his business, you mean?

The Court: No, his reputation.

By Mr. Sullivan:

Q. His reputation for truth and honesty, did you ever talk to anybody about that?

A. Leather houses that I used to do business with.

Q. What are the people's names?

A. Russo Leather Company.

Q. Who did you talk to down there?

A. To the man himself.

Q. What is his name? A. Russo, Alfred Russo.

(Testimony of Pete Latora)

Q. When did you talk to him about Mr. Tomsone? [332]

A. Oh, when I used to have my shop.

Q. How long ago was that?

A. About six or seven months ago.

Q. What did you say to Mr. Russo about him, or Mr. Russo say to you about Tomsone's reputation for truth and honesty?

A. He says he is an honest man.

Q. How did you happen to be talking to Mr. Russo about whether Mr. Tomsone was an honest man or not?

A. I had asked him, "How's Hubert?" He said, "He is doing all right." I said, "He is a nice fellow."

Q. What did he say? A. He said he is.

Q. Is that all he said? A. That is right.

Q. You asked him, "How's Hubert doing," and he said, "He is doing all right," and you said, "He is a nice fellow," and Mr. Russo said, "Yes"?

A. That is right.

Q. That is all you said about him to Mr. Russo?

A. That is right.

Q. Did you talk to anybody else about him?

A. No, sir.

Q. He is the only man?

A. Also other friends that we have. [333]

Q. Who are they?

A. A fellow named Sam Grayko.

(Testimony of Pete Latora)

Q. What did Mr. Grayko say to you about Mr. Tomisone?

A. We talked, he has been friends of our family for a long time.

Q. What did he say about him?

A. We talk about social things, not business.

Q. About social functions? A. Yes.

Q. Going out to dances? A. Get-togethers.

Q. His talk about him was about going together for a social evening, is that right? A. That is right.

Q. That is true about all the people you have talked to about him? A. That is right.

Mr. Sullivan: Nothing further.

The Court: Witness excused.

(Witness excused.)

The Court: Next witness.

Mr. Neukom: The Government rests.

Mr. Sullivan: We have nothing further.

The Court: Both sides rest.

Do you want to argue this tonight? [334]

Mr. Neukom: It is immaterial to me.

Mr. Sullivan: I would prefer to argue it tomorrow morning.

The Court: Recess until 9:30 tomorrow morning. Remember the admonition.

(Whereupon, at 4:50 o'clock p. m., an adjournment was taken until 9:30 o'clock a. m., December 13, 1946.) [335]

Los Angeles, California, December 13, 1946, 9:30 o'clock a. m.

The Court: United States v. Gage.

Mr. Sullivan: Ready.

Mr. Neukom: Ready.

The Court: Usual stipulation, gentlemen?

Mr. Neukom: Yes, your Honor.

Mr. Sullivan: Yes, your Honor.

The Court: Mr. Neukom.

Mr. Neukom: Your Honor, would the Clerk read the indictment rather than have me read it?

(At this point the indictment was read by the Clerk.)

Opening Argument in Behalf of the Government

Mr. Neukom: May it please your Honor, counsel for the defense, ladies and gentlemen of the jury: It now becomes my duty to discuss with you and try to explain to you the logical interpretation of the evidence in this case. I have a duty to perform which I wish to perform fairly and honestly. Dr. Gage had a duty to perform. Whether he performed that duty as charged in this indictment is a matter for you to decide from the evidence.

In all cases of where a person is charged with a crime, it is the duty of the Government to prove beyond a reasonable doubt the guilt of the person accused in accordance with the allegations or charges of the indictment. Now you will hear [337] considerable on that phrase, "reasonable doubt." I dare say counsel for the defense will argue that to you at great length. His Honor will give you an interpretation of what reasonable doubt means.

In my discussion of the evidence or anything that I say to you, as I talk, you should disregard my interpretation if it does not conform with the evidence that has come to you from the witness stand. Your recollection is the thing that you should be guided by. Any evidence which has been stricken and his Honor has told you to disregard, wipe it from your minds as if you had never heard it.

But going back to "reasonable doubt," and my discussion is not the law of this case, it is only my belief, the law comes to you entirely from the court.

I like to think of what a very elderly gentleman who used to come here quite often—he has now gone the way of all men—after he had given the definition of reasonable doubt as is generally given, he used to turn and sort of ad lib to the jury and say, "It just means good horse sense."

In other words, you must have an abiding conviction—and that is your duty to this defendant, to have an abiding conviction—to a moral certainty that you believe the Government has proved its case. But you have also a duty that when you believe the Government has proved its case, you should find the defendant guilty. [338]

There is nothing I dare say in human life that can ever be proven to a mathematical degree of certainty. We are all just human beings. But considering it in the manner in which you would the more weighty things of your life, giving the Government all that it deserves, giving the defendant all he deserves, then you should decide this case accordingly.

Ladies and gentlemen, sympathy has often been brought into play in the defense of any case. Sympathy is wonderful. Faith, hope and charity, and the greatest of these is

charity. We are all considerate of, and feel sorry for, anybody who is charged with crime. But remember that we are all free agents, and if we see fit to place ourselves in a position whereby the hand of guilt points towards us we do it voluntarily and we should not come and ask for sympathy. In your deliberations sympathy has nothing to do with the case.

Now let us go to some of the evidence in this case.

It is often a device that is used in the defense to try to try every issue other than the issue which is really before you. Smog, just smog.

The matter pertaining to this contract here had really nothing to do with this case. The only issues that you are really to decide is whether or not Dr. Gage did ask for, on or about October 3rd, from Mr. Tomsone, who had the contract, a sum of money, \$100 or any sum of money, with the intent of having it influence his decision.

The second count is, did he on or about October 18th re- [339] ceive \$100, a gratuity, with the intent on his part that it was going to influence his decision.

Isn't it rather unusual that after this conversation had taken place in the Mayfair Restaurant that 12 orders of shoes went through? I don't recall, but I don't think there was a specific denial of that in this case.

Now intent, ladies and gentlemen—and these things may seem elementary; I do not mean to have them so seem—but intent is a state of mind. There isn't any way in the world that we can dissect a man's mind and find out where in his brain just what was his intent at any given time. We cannot X-ray a man's mind to find out that intent. We can and we should look to the evidence and

all the circumstances and all the logical deductions to ascertain just what was the intent at any given time.

Ladies and gentlemen, when you have \$100 given to you by a man that you feel was irregular, a man who was cheating the Government by poor construction of shoes, a man who had made overtures to you of irregularity, a man who, as he stated, had thrown his check book down on your desk and said, "Write your check," and when you accept that \$100 and put it in your left-hand pocket and you accept it out in a parking lot, close to a car, this man that he says tagged along behind him, this man that had been so irregular that he thought he was no good, and he had an opportunity to go and turn that money over to [340] his superiors—does he? I would have more believed his testimony had it been that that money was slipped into his pocket, that it was placed in there, that he didn't know about it until it was found. But he walks into his office, there was a patient in his office, 10 or 15 minutes go by before the FBI apprehends and arrests him, and they find him red-handed with this money in his pocket. And it has been identified here by three witnesses.

If that isn't intent, if that isn't taking money, I don't know what is. He certainly could write prescriptions for shoes. It was his duty. It was one of the most essential parts of his duty. But this man would have you believe that he was protecting the exchequer of the Treasury of the United States from faulty shoes. This man who has taken \$100 for corruption—corruption in public office—and I say, ladies and gentlemen, that is a bribe, and he accepted it. It would have been a mighty good thing to have been able to have gone along for every week getting \$100 a week.

Dr. Gage, when he went to work—and it is his own testimony—stated that he didn't intend to stay long. He had no intention of staying long. And yet we see a most unusual design or desire to look into this contract, a contract of a similar character which had been maintained with the institution for over four years, or nearly four years, but he, the great reformer, believes that this is all wrong. [341]

Why was he so interested in this contract? Doesn't the true interpretation of the facts lead to only one conclusion? Just like Mr. Tomsone testified, that Dr. Gage wanted to get the contract under a fictitious name.

Look at Mr. Tomsone. An endeavor has been made to paint him as a person who could not be believed. The great Mr. Curry, the man who belongs to so many posts or has been the head of so many posts, showed to you just as clear as anything that he had a biased, a griping attitude. Why he was the great complainer. He prided himself in complaining. He griped, griped, griped, and yet he wears this man's shoes.

Ladies and gentlemen, had the shoes that he had on that he was wearing made by Mr. Tomsone been defective, had there been anything particularly bad about them—and which is collateral to this case, hasn't a thing to do with this case—they would have showed you those shoes. You would have seen those shoes. That poor workmanship would have been called to your attention. But was it? No, because it isn't true. It is just smog, smog.

When you are caught red-handed you have one of two things to do, either admit it and take the consequences, or try to devise some sort of a story that you hope somebody

is going to believe. Ladies and gentlemen, these two people when they first met early in September didn't hit it off—conflicting personalities. Mr. Tomsone is a person of Latin [342] derivation. Probably he is quick-tempered at times and was disturbed maybe to see a new doctor out there, and Dr. Gage was new and he was a little disturbed at Mr. Tomsone. But their enmity didn't last. The next time they met they were friends. They apologized and they were apparently friends.

But what happens? The next time, or shortly after that, the entreaty, the offer, the asking for of the bribe occurs. It had culminations, it had continuations, but we had the inception of it there early.

Then what happens? Shortly after that there is the invitation to have spaghetti. I don't know whether he was going to be over to the house or where it was. But anyhow Dr. Gage's explanation of this little slip, which has the address of his home on it, was that he was going to take me out for a spaghetti dinner. But this man, Mr. Tomsone, according to Dr. Gage, had already showed himself to be a wretched crook, a man who was going to gyp the Government, a man that had made overtures that were irregular. Do you believe Dr. Gage's explanation that he would have associated in a social capacity with such a person? It just isn't reasonable, it just doesn't ring true. it is not a clear bell, it is a false note.

Ladies and gentlemen, let's carry on a little more. This dinner at the Mayfair, or luncheon at the Mayfair, Dr. Gage would have you believe that Mr. Tomsone suggested that we go to the Mayfair. Isn't it more logical to believe that [343] the other was true? Is it a coincidence that Mrs. Gage was down at the Mayfair? I merely re-

cite it. It doesn't mean a great deal to the case. But it is just a chain in the continuity of circumstances which prove that Mr. Tomsone was telling the truth.

Mr. Tomsone—why you could hardly hear his voice there. He didn't show the spirit of emnity. He was trying to tell his story. He isn't as well educated as a lot of us, but he satisfied the Veterans Facility for nearly four years. He had to satisfy them. Had he been a man who would have had a vengeful attitude towards Dr. Gage, he would have exhibited the traits of Curry on that witness stand. And he didn't. And in the cross examination of Mr. Tomsone he was so careful with the truth that at times it became tedious, but he tried to stay right in the story that he had heard, and he wasn't shaken one iota. And he is the kind of witness that an able lawyer can shake because he isn't an alert man, a well-educated man, such as Dr. Gage is.

Now Dr. Gage, who has such an interest in this contract, and a man who knew Tomsone to be a crook, is willing on October 10th—and Mr. Duncan testified that he saw Mrs. Gage and Dr. Gage in Tomsone's shop downtown on October 10th, and Dr. Gage said he was only down there the one time with his wife, so you have to accept that testimony—on October 10th, after the incident of October 3 at the Mayfair Restaurant where [344] the specific offer of \$100 was suggested, the meeting was had where they had clinched the point excepting Dr. Gage didn't realize that Mr. Tomsone had notified the proper authorities of his dereliction.

But we will go back to October 10th. Is it reasonable for a man to take his wife down to a place to have her corrective shoes made, or shoes made, by a man who does

such poor workmanship as Tomsone? Would he be affiliating with this person? Where do we have in this case any place where Dr. Gage went to the proper authorities and complained of his contention of the nefarious character of Tomsone? There was an open-door policy maintained by Mr. Chapman. Mr. Chapman didn't say that he had ever so complained. Dr. Long, his superior, didn't ever so say that he had complained.

Of course he isn't going to complain because he didn't know that Mr. Tomsone had told about him, and he was continuing on and he thought that was a pretty nice chestnut that he was going to pick up. Ladies and gentlemen, it is regrettable to have to prosecute a man who has studied, who has become a medical man, a man of his age. It is also regrettable that a man will sell his honor or information for so little. But corruption in public office cannot be condoned.

Could you believe the testimony coming from Dr. Gage—well, I think it is collateral—but think of the testimony of the irregularity of these shoes, the inferiority of the [345] shoes. Now he has read this contract, he says he has, and you are going to get it if you wish—all of the evidence will be accorded to you—but not a single pair of shoes or a device that Mr. Tomsone makes can be paid for or accepted unless a doctor accepts them as being good. The other doctor who was in the orthopedic department, the other phase of the hospital, so testified. Dr. Gage so testified. The contract is plain. "The Facility reserves the right to reject all items which are faulty in construction, or in which the materials are of unsatisfactory quality.

"No item will be approved for payment until it has been inspected by an authorized representative of the Facility. Acceptance will be governed by the quality of materials, character of workmanship and accuracy of fittings. Before final rejection is made, reasonable opportunity will be given contractor to make the required corrections of faults and adjustments."

I dare say, ladies and gentlemen, that Dr. Gage never read that part of the contract. He was only interested, I dare say, in the items pertaining to price. Remember at this luncheon at the Mayfair that the testimony is to this effect: After they had been discussing this proposition and Dr. Gage had said, "We can both make a lot of money," Dr. Gage then asked, "What about \$100?"

Tomson said, "\$100 a month?" [346]

Dr. Gage said, "Hell, no, \$100 a week."

It was then agreed that they would start writing more orders, Dr. Gage would, and the next Friday twelve orders appeared.

When Dr. Gage was arrested he clearly knew that he had run the gamut of his wrongdoings and he made a remark to the FBI agent which shows a consciousness of guilt. He said he expected this. When he called his wife down at the FBI office—now, listen, we all know that we often will talk over with our wife things that we won't talk over with anybody else, times we do talk over things with our wife that we should—but he hadn't talked to Mrs. Gage all that day, and he talked to her over the telephone and he was heard to say to her, "Yes, I took the money."

Why would he say that if he hadn't previously told her of his plans. That shows consciousness of guilt. Intent, ladies and gentlemen, is a crucial thing in every case. It is not an unusual thing in every case, it is the usual thing. Reasonable doubt is not an unusual thing, is it the usual thing. The presumption of innocence is not an unusual thing, it is the required thing. In some jurisdictions, in Europe, the policy was that you were presumed guilty until you proved the contrary. That isn't the American Way. A man is presumed innocent at every stage of the proceedings until the contrary is proven beyond a reasonable doubt. But when the con- [347] trary has been proven beyond all reasonable doubt, none of those great bulwarks of Anglo-Saxon jurisprudence can be used to stop you in performing your duty and in finding a man guilty of the act that he allegedly and deliberately performed.

In conclusion, it is my belief that this evidence has proven beyond a reasonable doubt to the satisfaction and according to all the requirements of the law that on or about October 3rd—that is the date at the Mayfair luncheon in Santa Monica—he did ask for a bribe in the sum of \$100, with the intent to influence his decision, as charged in the indictment; and on or about October 18th he did receive the bribe in the sum of \$100 with the intent to influence his decision.

The Court: Mr. Sullivan.

Argument in Behalf of the Defendant

Mr. Sullivan: May it please your Honor, Mr. Neukom, ladies and gentlemen of the jury: At the outset, let me say this, that I certainly agree with Mr. Neukom when he told you that it is the duty of the Government to prove to your satisfaction to a moral certainty and beyond a reasonable doubt the guilt of this defendant. I think that you all know and realize by now, perhaps some of you have had past experiences in jury duty here in this court, that it is not the duty of this defendant to establish his innocence.

Let's examine the evidence in this case and see whether [348] or not it convinces you, ladies and gentlemen of this jury, to a moral certainty and beyond a reasonable doubt that Dr. Gage is guilty of the charges contained in this indictment.

After all, it isn't of any particular importance what interpretation might be put on this evidence by counsel for the Government. By the same token, it isn't of any particular importance what interpretation I might put on this evidence. But it is important, and extremely important, both to the Government and to Dr. Gage, what interpretation you ladies and gentlemen of this jury put upon the evidence in this case. All we attorneys can do is to analyze it as we see the evidence, to assist you in some small measure in arriving at a true and correct verdict.

Mr. Neukom cautioned you about resorting to sympathy in arriving at your verdict in this case. Well, I say to you ladies and gentlemen that we of the defense do not want you to decide this case upon sympathy. We want you to decide this case solely and exclusively upon the evidence

as it came to you from the witnesses in this courtroom. And we say to you that if you do decide this evidence—and we know that you will decide it—solely and exclusively from the evidence as it came to you in this courtroom, that you can reach no other verdict except that Dr. Gage is not guilty of the offenses charged in this indictment. So I come now to an analysis of the evidence in this case. [349]

There are certain things in so far as this evidence is concerned that are absolutely undisputed. The gist of the offenses charged in this indictment I think has already been pointed out to you, that Dr. Gage in the first count asked for a bribe to influence his official action or conduct as an orthopedic physician and surgeon at the Veterans Administration; the second count charges him with having received a bribe with intent to influence his official action or conduct in matters that might be brought before him in his official capacity as an orthopedic physician and surgeon at the Veterans Administration.

Now there isn't any question but what Dr. Gage was employed by the Veterans Administration as an orthopedic physician and surgeon. There is no question but that matters which came before him, in so far as his duties as an orthopedic physician and surgeon were concerned, had to do in part with prescribing orthopedic or corrective footwear for the veterans. Therefore in so far as his duties there were concerned, you have no question. I think that is admitted by the defendant, that in so far as his duties in ordering shoes under this contract was concerned, he was acting in an official capacity.

In so far as his transactions with Mr. Tomsone were concerned, wherein Tomsone handed him \$100, you then

come to decide the question: What was the purpose or intent that ex- [350] isted in his mind at the time that money was given to him, and therein we come to an issue, an issue which you ladies and gentlemen of the jury will be called upon to decide.

Mr. Neukom told you that it was often the policy of the defense to try every issue except the one involved in the indictment. Well, that is the only issue that we have attempted to try in this case, and after all, the evidence which the Court has permitted to go to the jury for their consideration, certainly is material in every respect to a determination of that issue. The contract itself has been admitted in evidence for your consideration, and so the determination of this contract, which you may consider, are material in determining the issues involved.

Let's examine the evidence, in so far as the relationship between Dr. Gage and Mr. Tomsone is concerned. That Dr. Gage was employed at some time in the early part of August goes without saying. At the time he accepted the position as an orthopedic physician and surgeon, the contract with Mr. Tomsone was already in existence, that contract having come into existence on the first day of July 1946.

Dr. Gage had been working there for a month, or maybe a little over a month, before he ever had any occasion to meet Mr. Tomsone. According to Mr. Tomsone's testimony, he did not meet Dr. Gage until the Tuesday after Labor Day.

What is the first thing that takes place between these [351] gentlemen? Almost at the inception of their meeting, according to the evidence in this case, Dr. Gage com-

plains to him about the manner in which he is performing his duties under this contract. What happens? A quarrel ensues between these men. Immediately animosity is aroused. Now if these complaints have come in, and if, as the Government says, Mr. Tomsone can't collect his money until these things have been approved, until all the terms and conditions of the contract have been fully performed, remember this, that every time there is a complaint that comes in, every time that Mr. Tomsone has to do the work over, every time he has to correct some defect of something that he failed to do, it costs him more money. His profits naturally are less. And I think that you ladies and gentlemen of the jury are satisfied that many complaints have come in there, that the veterans themselves have complained about the manner in which he made their shoes. But remember this, that there exists in the mind of Mr. Tomsone at the time of his first meeting, he believes, and he so testified on the witness stand, that the orders he had been receiving for orthopedic shoes had dropped down since Dr. Gage came there early in August until he first met Dr. Gage. He testified further that between the time of his first meeting with Dr. Gage and the time of his—he met Dr. Gage on October 3rd—that his orders further declined.

Now whether they did or did not, it seems to me, is not [352] really material, but Mr. Tomsone himself believed that those orders had declined during that period of time. Actually I think that when you examine Government's Exhibits 4 and 5 I believe that you will see that Mr. Tomsone is in error when he tells you that his orders had declined. For instance, on Government's Exhibit 4, which had to do with the number of shoes ordered by the

outpatient department or for the outpatients, you will find that in the month of August there were nine pair of shoes, orthopedic shoes, ordered, in the month of September, when Mr. Tomsone said they further declined between his first meeting around about the 3rd or 4th of September until the 3rd of October, that they declined further, you will see there were orders placed for 18 shoes. In other words, the orders had doubled that month. Now that is the Government's own exhibit here. That had to do with the outpatients.

In the home department there were orders in August for five pair of shoes and in September there were orders for one. So you have a total of 14 pairs of shoes ordered in August and you have a total of 19 pairs of shoes ordered in September.

Now compare those with the July figures. In July there were 20 pairs of shoes ordered. These things are bound to vary a few pair of shoes depending upon the number of patients that come in for examination or the needs of the patients, but when you examine these exhibits, Government's Exhibit 4 [353] and 5, I think you will see that the variance is very slight. It is only a variance that might be normally expected.

However, I think that the evidence does show this, and I think it shows it without contradiction, that Dr. Gage in his capacity as the orthopedic physician and surgeon there, and because of the complaints that he had found with Mr. Tomsone's work, had come to realize that it was not for the best interests of the veterans whom he was there to serve that the veteran should be compelled to go to Mr. Tomsone to get his shoes. After all, he was doing a job there for the veteran. He was trying to satisfy the

man who had seen service for his country and as a result of which he had suffered some disability. He had to sit there day after day interviewing some 30 or 40 patients, listening to their various complaints, listening to their complaints that Mr. Tomsone couldn't build their shoes satisfactorily for them, and what was he trying to do? He was trying to prevail or find some manner or means whereby the veteran would not be bound because of a contract existing between the Veterans Administration and Mr. Tomsone to have to go to Tomsone to build him shoes. He wanted that veteran to be able to procure a pair of shoes that would be satisfactory to him.

What did he do? And this is admitted by Mr. Howe, one of the Government's witnesses. Dr. Gage went to Mr. Howe. He complained to Mr. Howe about these contracts. He said, [354] "This isn't a proper orthopedic contract." Mr. Howe, the Government's witness, admitted that on the witness stand.

What did Mr. Howe say to him? Mr. Howe told him, "Well, you are an orthopedic man. You redraft that contract the way it should be drawn in order to furnish these men with orthopedic shoes."

That contract had a 30-day cancellation clause in it, and that matter was brought to the attention of Mr. Tomsone, and I think Mr. Tomsone knew and realized at that time there was a possibility that this contract would be redrafted and drawn in the manner in which a proper orthopedic contract should be drawn, and there was a possibility that he would suffer a cancellation of this contract.

Not only that, but if you take the testimony of Dr. Long, another Government witness, Dr. Long says, well,

he didn't complain about the shoes or the way he did it, but he did say we ought to have more than one contract so the veteran has a choice. After all, that is not an unreasonable request to make on behalf of these veterans. You yourself know that if you go to one shoestore and you buy a pair of shoes and they aren't satisfactory, you don't go back and you go some place else. What he was trying to do for these veterans was to give them a choice so that they would be satisfied. And that matter was conveyed to Mr. Tomsone. He knew about it. He knew that there was a possibility that his contract might be [355] canceled.

Now that certainly didn't generate in his mind any friendly feeling toward Dr. Gage. So what does he do? He sets about and puts in motion this operation, a scheme or plan whereby he is going to see that Dr. Gage is discredited in the eyes of the Administration, and being so discredited he will get rid of him. It might be that Tomsone may have realized that Dr. Gage was the first man that really knew his business there so far as orthopedic work was concerned. He probably realized and knew that when he had some man there handling the job who knew his business that he couldn't satisfy him because of the type of work he was turning out.

There isn't any question, ladies and gentlemen, as I said before, that there were lots of complaints by these veterans. You heard some of them on the witness stand here. You heard Mr. Curry, whom Mr. Neukom so thoroughly castigated here. He told you that Curry had on a pair of Tomsone's shoes when he was on the witness stand here, and if there was anything wrong with them it would have been found out. And why is he wearing a pair of Tomsone's shoes when he comes into court?

Why are all of the other veterans who have to wear orthopedic shoes wearing Tomsons's shoes? They are wearing them because they have to wear them, because they can't procure them any place else. That is why they are wearing them. Tomsons had the exclusive contract and, as I told you a moment ago, that [356] was one of the gripes, if you want to call it a gripe, of Dr. Gage's. They couldn't get their shoes anywhere else and, like Curry and like the other veteran we had here on the witness stand who was wearing Tomsons's shoes, they were wearing his shoes because they had to wear them. They couldn't get them any place else.

It is true that Mr. Curry admitted that he was prejudiced against Mr. Tomsons. Naturally he was biased. He said he hadn't been satisfied, but in addition to that he had some knowledge of Tomsons's reputation for honesty and integrity and for telling the truth. He talked to people about it. He knew and had heard of instances where he would make appointments with these veterans and never show up. They had gone there time and again and he wouldn't be there. From what he learned of his dealings he told you that he wouldn't believe him under oath. He is a man that had had dealings with him. His dealings were with him because he was compelled to deal with him, he had no choice in the matter, and likewise with respect to the other veterans who testified here.

That is evidence touching upon the credibility of Mr. Tomsons as a witness, and if you believe that evidence, ladies and gentlemen, if you believe that evidence produced by those two veterans here in this courtroom under oath you are at liberty to disregard and discredit all of the testimony of Mr. Tomsons. [357]

Tomsone then tells you that Dr. Gage gave him his name and address, according to Tomsone, to come down there and discuss this proposition which he claimed that Dr. Gage had made to him. Well if, as I believe, Mr. Tomsone had set in motion some scheme or plan that was going to ultimately result in the discharge of Dr. Gage, he was going to carry that thing through to its logical conclusion. He was doing it principally upon his own. And so he had to have something in the handwriting of Dr. Gage that would strengthen his contention. And so it may well have been that he came to Dr. Gage, as Dr. Gage suggested on the witness stand here, and invited to take Dr. Gage and his wife to dinner and asked him where he lived, write your name and address on that slip of paper, so he kept that. But he never went down there. He didn't go to Dr. Gage's home. What does he do? And this I think is significant in view of the inference that the Government attempted to create in your minds by their cross examination of Dr. Gage.

It seemed to me that they were endeavoring to create the inference that there had been a plan or prearrangement between Dr. Gage and his wife that she was to be at the Mayfair on the day that Mr. Tomsone took Dr. Gage down there for lunch. Well, I think if you examine the evidence carefully you will see that it would have been impossible for any such prearrangement to have occurred, for this reason: Mr. Tomsone [358] didn't call Dr. Gage on Wednesday to take him to lunch until nearly noon. He knew the time that Dr. Gage went to lunch, and according to his testimony there was no understanding between himself and Dr. Gage that he was going to phone him that day. In other words, he hadn't told Dr. Gage,

"I will phone you tomorrow and we will go to lunch," or told him a few days before, "I will phone you on Wednesday and we will go to lunch"; he waited until Wednesday and then out of a clear blue sky he phoned Dr. Gage and invited him to lunch. He says that he phoned Dr. Gage and told him he couldn't come to his house, but how about meeting him for lunch. Dr. Gage said he phoned him and invited him to go to lunch, and he met him out at the Facility.

Now I think that Mr. Neukom was a little bit mistaken in his recollection of the evidence, because if I remember his argument correctly he seemed to imply that Dr. Gage testified here that Tomsone was the one that suggested the Mayfair as a place to go to lunch. Now Dr. Gage didn't so testify, as I remember his testimony. I think he said that Mr. Tomsone, after he met him, started to drive towards Westwood and that Dr. Gage said, "Well, there isn't any good place here, let's go to the Mayfair." So Dr. Gage himself is the one who suggested the Mayfair as a place to go to lunch. So they went to lunch there.

Now Tomsone met him just a very few minutes after call- [359] ing him. Dr. Gage suggested they go to the Mayfair. They went there. The fact that they might have met his wife there as they were leaving is certainly a coincidence. There isn't anything about that that shows a preconceived plan, nothing whatsoever. After all, Dr. Gage told you that he lived in Santa Monica. I assume that he and his wife might have eaten at the Mayfair before. So there is nothing sinister about the fact that Mrs. Gage happened to be there that day, or happened to walk in with some friends of hers as they were leaving.

What transpired there? Again there is a conflict in the evidence. Dr. Gage says that Mr. Tomsone said to him, "Well, you can use some money."

"What do you mean? I don't want any money."

After all, remember this, Dr. Gage had been a practicing physician for almost 19 years, or close onto 20 years. He had served for four years in the Army. He was discharged some place here in California and, like lots of the boys who were in the service, they got out here to California and they liked our country, they liked our climate, they liked our state, they liked our city, and they want to stay here.

What was his ambition? His ambition was to come out here to California to take the State Medical Board examination that would be required of a doctor from another state and practice his profession here in California. That was his [360] one aim, his one ambition. He had taken the examination once and he had failed to pass it. That probably is not unusual in view of the fact that we heard from the witness stand his testimony here that almost his entire professional life had been devoted to specializing in orthopedic surgery, and I assume that with many of those board examinations when you are examined about any of your qualifications they don't confine the examination to the things that a person has particularly specialized in, but their examinations are of a general nature. You know once a doctor specializes in a particular field of medicine or surgery he becomes a bit rusty in the general practice of medicine. But he didn't stop when he took the examination the first time, he took it again and unfortunately he failed to pass it the second time.

In the meantime and with the intent, as he told you, to take the examination the third time he accepted this position out there, not as a permanent proposition as far as he was concerned, he took it temporarily until he was able to take the examination again and determine if he could be licensed to practice his profession here in California.

Now do you think that this man, who had spent 19 or 20 years of his life serving humanity, who had spent practically four years of his life serving his country, that he would come out here to prepare himself to practice his chosen profession in the state of California, take a temporary position [361] at the Veterans Administration, and corrupt his whole life, this man who, according to the character witnesses that we produced here, Dr. Townsend, Mr. Ambling, Mrs. Leflin, Mr. Kramer, those people who had known him, some not too long, some for many years, who knew of his reputation as a law-abiding citizen all his life, knew that it was good, was he going to come out here and corrupt himself for a small pittance, \$100? Certainly not. He had his professional career at stake.

But more than that, after he took this job at the Veterans Administration—he was a doctor, he had been serving humanity all through his professional career—he came in there and he saw the kind of a deal that these veterans were getting. Maybe he was going to be a reformer and reform the whole procedure out there, but one man can't do it. It just is impossible. He might have had high ideals, he might have started out with the thought in mind that he could remedy these defects in the procedure, that he could make things better for the veteran if he

could make himself heard around there, but you just can't do it. You can't buck up against an administration like that and change these long-established procedures, even though you are trying to do it in the interests of the veteran.

Well, that takes us down then to the 3rd of October. If I remember correctly, the next incident of importance, [362] according to Mr. Tomson, was the occasion when he came into Dr. Gage's office and threw a check book down on the desk and said, "Write yourself out a check." He said that Dr. Gage said to him, "I don't want a check, it has to be cash."

Well, Dr. Gage said something to him about making himself out a check and he said, "Go away. Don't bother me."

Tomson, in his endeavor to get rid of Dr. Gage, procured this address before that, but he wanted something else in writing, so he throws a check in front of him. Certainly Dr. Gage told him, "Go on away. I don't want your check." So he didn't take it.

Then on the 18th he met him there sometime after 2:00 o'clock and he said that Dr. Gage asked him to come on down to the canteen and have a cup of coffee. They went down to the canteen, from there on out to the auto park where, according to Tomson, he handed the money to Dr. Gage. There is no question but what he handed the money to Dr. Gage. There is no question but that Dr. Gage took the money and put it in his trousers pocket. There is no evidence of any bribe in any way. Mr. Tomson didn't say that Mr. Gage took the money and counted it, clipped it together and put it in his pocket. He said he handed the money to Dr. Gage and Dr. Gage slipped

it in his pocket, in his left trousers pocket. There is no evidence that at that time anything was said to Gage as to how much money there was, what the denomination of [363] these bills was or anything else.

But remember this, that Dr. Gage, according to his testimony, had prior to that time complained to Dr. Long that Tomsone was trying to proposition him, and Dr. Long had no recollection, either he had no recollection of any such testimony or denied it, I forget which, but you will have to rely upon your own recollection of that, but in any event you have to remember this, that Dr. Long was the chief medical officer of the outpatient department and the outpatient department consisted not only of the orthopedic department but of every other department where the outpatients have medicine and surgery that were treating outpatients down there, and unquestionably Dr. Long was a very, very busy man and unquestionably there would be many things that would come to his attention that his recollection might be somewhat faulty on. I believe, and I honestly believe, that Dr. Gage did go to him and did tell him that Tomsone had been trying to proposition him.

In any event, Dr. Gage told you that when he took this money it was his invention to go to Dr. Long with it. Now there was considerable inference and emphasis put upon the fact that after he came back into the building he went into his office instead of going directly to Dr. Long's office. Well, remember this, that when he came back there Tomsone came with him, Tomsone followed him back there and, after all, [364] he didn't have to take that and go immediately into Dr. Long's office with it, or he didn't have to take it and go immediately over on Sepulveda Boulevard to Mr. Chapman with it. He didn't have

to rush over there right away with it and say, "Aha, at last I've got him. Here it is. I just took it. He just gave it to me." I mean, there was time to do those things. After all, as the Government contends here, the Government contends that on the 3rd of October Dr. Gage asked Tomsone for a bribe, and they have formed that particular matter as Count 1 of this indictment, and they claim that on the 3rd of October Dr. Gage committed the offense of asking for a bribe. Well, they didn't arrest him then, did they? If, as they contend here, a crime had been completed at that time, if, as the Government contends, Dr. Gage then asked of Tomsone a bribe, that is a complete offense, and that is the matter contained in Count 1 of this indictment. But they didn't arrest him.

Instead they say no, "When he took this money and said he was going to Dr. Long or to Mr. Chapman he should have gone immediately there." Well, if that be true, if, as they contend, he committed that offense on the 3rd of October, why in the name of common sense didn't they arrest him at that time? I will tell you why they didn't arrest him. Because they knew that no such crime had been committed at that time. Maybe Tomsone had said something to somebody, but they had [365] their doubts about Tomsone too.

Now there is another significant thing about the evidence in this case, ladies and gentlemen, which you can take into consideration in determining the intent that was in the mind of Dr. Gage. We had Dr. Levine up here, we had Dr. Kane, we had Mr. Chapman, Mr. Nie, we had Dr. Long, we had Dr. Musset, we had Dr. Strachan—all of these men who were connected with the Administration out there, all of them who said to some greater or

less degree that Dr. Gage was complaining about Tom-sone. His principal complaint seemed to be that Tom-sone's work was not as it should be. He complained to his associates at the Administration there about Tom-sone. Now do you think that it would be logical for a man to go around and spread all these complaints about a man who was furnishing shoes to the Administration there, make it known wide and far out at the outpatient department there or the Administration that this man doesn't know his business, he *disn't* building things according to the contract, and then turn around and with no further ado immediately begin to send him large orders for shoes? I mean that just isn't logical, to assume that he would do that.

If he were laying a plan to accept a bribe from Mr. Tom-sone he certainly would have endeavored to build Tom-sone up in the minds of his associates there so that when Tom-sone did begin to receive more orders there would have been a logical [366] reason for it. In other words, he would have been satisfied and he would have let everybody else know that Tom-sone was a great guy, that he was doing a good job there, that he was going to send him a few more orders. These little doubtful cases we can weigh them in favor of the veteran because he is doing a good job.

But that wasn't the way he operated. Just to the contrary. He denounced him, denounced him time and again. Is that the foundation for a scheme or plan on his part to accept a bribe from Mr. Tom-sone in order to send him more orders for shoes? Certainly not, ladies and gentlemen, and I don't believe that you believe that under those circumstances he would have done such a thing.

So that again is something that you may take into consideration in determining what was in the mind and heart of Dr. Gage. He told you here specifically that he never at any time had any intention in his mind and heart to ask a bribe of Tomson for the purpose of influencing his action or decision on any matter that came before him out there as an orthopedic physician and surgeon. He told you again specifically that he never at any time had any intention in his mind and heart to accept from Mr. Tomson a bribe for the purpose of influencing his action and decision on any matter that might come before him in his official capacity as an orthopedic physician and surgeon. I believe that his Honor in his in- [367] structions that he will give to the jury will tell you that if the evidence in this case is susceptible of two reasonable constructions or interpretations, one of which would admit of the guilt of Dr. Gage and one which would admit of his innocence, that it is your duty, your sworn duty as jurors, to adopt that construction which will admit of his innocence and reject that which points to his guilt.

Remember this further, ladies and gentlemen, the fact that he did take the \$100, that would raise suspicion in your mind. I realize that, that it raises a suspicion. But again suspicion is not evidence. No matter how grave the suspicion is, it is never evidence sufficient upon which to base a verdict of guilty.

And so I believe, ladies and gentlemen, that when you have weighed and considered all of the evidence in this case in the light of the instructions as they will be given to you by his Honor that you can reach no other conclusion than that Dr. Gage is not guilty of the offenses charged in this indictment.

Thank you.

The Court: Mr. Neukom, how long will you want to close?

Mr. Neukom: I think about 10 minutes.

The Court: Very well.

Closing Argument in Behalf of the Government.

Mr. Neukom: Dr. Gage is a great benefactor. He is a [368] man that was so interested in these poor veterans that after he had only been there a short while he immediately takes four days off to take care of other matters. The day he was caught with the bribe he had been two and a half hours away for lunch. He admits it. The day he went with Mr. Tomsone to Santa Monica, despite the fact that there is a canteen right on the place, they go down to Santa Monica, drive all that distance. Why, ladies and gentlemen, the only desire upon the part of this man to be a benefactor of these poor veterans has been conceived since his arrest.

Counsel would inquire as to why he was not arrested on October 3rd. Obviously the case at that point was one man's word against another. The asking is a much different thing from receipt. I don't know how you try to interpret this evidence, but anybody who took from a person that they had the disregard for that he said he had, this man that had been offering him irregular things, placed his check book out on the table to allow him to write a check for his benefit, why ladies and gentlemen, the first thing you would have done, and especially with Mr. Tomsone tagging along behind, was to get Tomsone by the scruff of the neck and drag him in to somebody and say, "Look what he has done. He has tried to bribe me."

But he didn't do that. He didn't expect to be caught.

Dr. Gage has violated the Eleventh Commandment: Thou shalt not be found out. Character witnesses are of no avail [369] if you have committed a crime. There is always the first time. Many a man goes through life and even advances without committing a crime, and he has had a good character in the past, but character is of no avail if you are caught flat-footed and red-handed.

The Bible carries a characteristic or a most noteworthy example of where a man sold his birthright for a pot of porridge. People have been tempted to and have done things which seem inexplicable when they do them, when they are public officials, but corruption in public office should not be condoned.

I contend, with the evidence here, it establishes beyond any question of doubt the truth of the statements made by Mr. Tomsone. They are corroborated by other people to whom Mr. Tomsone had complained. Had Dr. Gage produced one single person here in court to whom he had said that Mr. Tomsone is endeavoring to offer me a bribe and had made such an entreaty to me a month ago, or something like that, there would be something to his story. The only thing that Dr. Gage was interested in was to make complaints about this contract that he himself was interested in. You will remember the testimony that he wanted Mr. Tomsone to step aside, that it would be canceled and that he would get the contract under another name. Naturally he didn't care whether he criticized Tomsone or not. But he never criticized Tomsone's work to his super- [370] ior, he never criticized it to the manager Mr. Chapman, nor to Dr. Long, and I think you will remember their testimony. And they had no reason to do anything else but tell the truth.

You will remember the FBI was working on this case and on the 15th of October the agent heard these remarks: Tomsone said—this was Dr. Gage and Tomsone in Dr. Gage's office—Tomsone said, "I meant to bring the money out today but I couldn't."

The doctor replied, "Oh, that's all right. Don't worry about it."

You remember the words. I have just my notes here.

At this point there was some low conversation which couldn't be heard, and he heard the doctor's voice say. "Next Friday I have got to be downtown."

Tomsone then replied, "Friday?"

And the doctor answered, "Yes. You understand what I mean by that, don't you?" or words to that effect.

That showed a plan, that showed the guilty intent, that showed just exactly what was in his mind.

I do say, ladies and gentlemen, that there has been an effort to try the contract here rather than to try the issues, but that is for you to decide. It isn't unusual for only one contract to be in existence. Government officers are compelled to accept the lowest bid if it is otherwise a qualified bid. Tomsone had apparently been giving satisfaction for [371] nearly three and a half years out at that Facility. There is nothing in the evidence here to indicate that this was not a regular Government contract. There has been no effort upon the part of this man, other than his complaints that I think are more now in his mind than they were at any other time, to just try to discredit this contract.

It is very true that veterans, and especially veterans who are suffering from disabilities and have a lot of time

on their hands, will gripe and complain a lot. Why even we healthy people gripe and complain a great deal about petty things. And it is also true that certain veterans would have been dissatisfied. Do you know of anybody that can satisfy everybody? It would be a wonderful character to know.

This man was experienced in his orthopedic work, he had been in it for years, the evidence showed that he had tried to make adjustments whenever he could, he even testified that it was his policy to go out and fit the veterans at their places, their homes. There was nothing to show that Mr. Tomsone wasn't trying to cooperate. The thing that Mr. Tomsone did, and did right, was to immediately notify the proper officials at the Facilities and cause a proper investigation to be conducted, which I think was proper here because of the conclusion that was reached, which culminated in this man doing just what he intended to do and then being caught red-handed. But I do not think that should be used as critical [372] against Mr. Tomsone. I don't think Mr. Tomsone was very worried that Dr. Gage was going to make him lose his contract. I think Mr. Tomsone was worried that he might get involved with this Dr. Gage and therefore he promptly reported it, as is evidenced from what Dr. Long said, what Mr. Duncan said and I believe other testimony that has been offered here.

I didn't mean to draw any improper allusions or conclusions as to the happenstance that Mrs. Gage was at the Mayfair, and I don't think there was anything, as counsel says, sinister in that. The only thing sinister in that is where the offer specifically was made of \$100 a week. Remember that Mr. Tomsone in this contract—

and you can see it—not only had this outpatient department, this one particular Facility, but he had a contract which covered a great many other institutions. Don't try to impeach him upon the grounds that he said he couldn't remember whether it was more or less than one month, because the little man said, "I don't know for sure, but I will get my books if you want them." Nobody tried to get him to get his books. I don't think it mattered. The whole thing that did matter was that there were more shoes being offered, being ordered, after they had met at the Mayfair Restaurant.

Now, ladies and gentlemen, you must decide this case from the evidence that has been offered. The Government is entitled to your verdict if you believe it has proved its [373] case beyond a reasonable doubt. The defendant is likewise entitled to such a verdict if the Government has failed. But you must use all proper and logical deductions from the evidence, and in reasoning and in discussing this matter with each other you must be fair with one another but you must reach a right and correct verdict.

There may be read to you an instruction upon the theory of entrapment. Counsel has not argued that, hence it is with some reluctance that I allude to it. If a person is entrapped to commit a crime which he wouldn't otherwise do, the Government has no right in prosecuting him. But if a person is merely caught by Government agents who gave him an opportunity to commit a crime which was in his mind, the mere fact that he is caught and was afforded the opportunity to do what he had previously planned is no defense, nor is it entrapment.

I wish to thank you for your very patient and kind attentiveness in connection with this case.

The Court: Ladies and gentlemen, this is the time that I should instruct you but you have been here since 9:30. I have another case which has been set for this morning and I think that I will declare a short recess in this matter and impanel the jury in the other matter and let them go until 2:00 o'clock so as to save the inconvenience of those who would not be chosen. So you will retire to the jury room until called. Remember the admonition. [374]

(Short recess.)

The Court: The record will show that the defendant is present in person and by counsel and that each of the jurors is present and in his or her place in the box.

Mr. Neukom: So stipulated.

Mr. Sullivan: So stipulated. [375]

Instructions to the Jury.

The Court: Ladies and gentlemen of the jury, it now becomes my duty as a judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow that law as I shall give it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be *must be* exercised with sincere judgment, sound discretion, and in accordance with the rules of law as I shall state them to you.

If in these instructions any direction or idea be stated in varying ways, or if a subject matter is treated first or last, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the

instructions as a whole and to regard each one in the light of all the others. Nor are you to regard any repetition or partial repetition of an instruction as a special emphasis on that instruction.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact directly in dispute, without an inference or a presumption, and which in itself, if true, conclusively establishes the fact in issue. Indirect [376] evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or a presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive—and there are no conclusive presumptions in this case—a presumption may be controverted by other evidence, direct or indirect, or by another presumption, but unless so controverted the jury is bound to find according to the presumption.

An inference, on the other hand, is a deduction which the reason of the jury draws from other facts which are proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, or by the course of business or the course of nature. The word “propensity” as I have used it means any natural or habitual inclination or tendency.

You are not bound to decide in conformity with the testimony of any number of witnesses which does not

produce conviction in your mind as against the declarations of a lesser number of witnesses or as against a presumption or other evidence [377] which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified. It does mean that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness, entitled to full credit, is sufficient proof for any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclin- [378] ation to favor, any party. Was he, in other words, a biased or impartial witness? What degree of intelligence, what

quality of memory, what grade of moral purpose, so far as concerned this case, were revealed by his appearance, manner of testifying, and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts? Was there any timidity, physical handicap, lack of ability in self-expression or other condition that placed the witness at a disadvantage or caused his testimony to appear on the surface as being less trustworthy than it really was? Was the witness without fault of his own confused or embarrassed and thus placed in a ilght not truly representative?

Should you consider any of these questions, either in your own private reasoning or in open discussion, you must look for an answer only to the evidence admitted in the trial of this action.

Any evidence that has been received on an act, omission or declaration of a party which is unfavorable to his own interests should be considered and weighed by you like any other admitted evidence. but evidence of the oral admission of a party, rather than his own testimony in this trial, ought to be viewed by you with caution.

From time to time counsel for one or the other parties has interposed objections to evidence. Counsel not only have [379] the right, but the duty to make any and all objections which are deemed advisable or appropriate, and no inference or presumption can or should be indulged in one way or the other by reason of the interposition of such objections.

At times throughout the trial the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and

are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law, and in admitting evidence to which an objection might have been made the judge does not determine what weight should be given such evidence, nor does he pass on the credibility of any witness. As to any offer of evidence that was rejected by the judge, you of course must not consider the same, and as to any question to which an objection was sustained you must not conjecture as to what the answer might have been or as to the reason for the objection.

The law does not require the accused to prove his innocence, which in many cases might be impossible, but on the contrary the law requires the prosecution to establish beyond a reasonable doubt and by legal evidence his guilt, and all the elements of his guilt. If the Government fails to so prove beyond a reasonable doubt all the elements, as I shall define them to you, you must find the accused not guilty. [380]

You must not allow yourselves to be led to convict the accused in this case in order to satisfy a fear that some offense may go unavenged or unpunished, or for the purpose of deterring others from the commission of any like offenses. No such specious argument or reason can be weighty enough to justify you in laying aside that just and humane rule of law which requires you to acquit the accused unless every fact necessary to establish his guilt is proved to you beyond a reasonable doubt and to a moral certainty.

The rule concerning circumstantial evidence does not permit you as jurors to indulge in speculation, surmise, conjecture or guesswork in order to supply any element of

the offense alleged by the prosecuting witnesses in this case to have taken place, where proof of such element does not appear beyond a reasonable doubt and to a moral certainty. Speculation, surmise, conjecture or guesswork can never be substituted in lieu of proof in order to justify a conviction of an accused person.

Suspicion is not evidence. Mere suspicion, however strong, is not sufficient to establish any fact whatsoever necessary to constitute the crime charged. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence support the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable [381] that the accused is guilty than innocent to warrant a conviction. The accused must be proved to be guilty so clearly that there is no reasonable theory upon which he can be said to be innocent when all the evidence is considered together. Mere opportunity of the accused to commit the crime charged is insufficient to justify a verdict of guilty.

Each essential independent fact necessary to complete a chain or series of independent facts tending to establish a presumption of guilt should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances must all concur to show that the defendant committed the crimes and must all be inconsistent with any other rational conclusion and must exclude to a moral

certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt.

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives his opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such [382] opinion, if you find it to be unreasonable.

In every criminal case the proof must substantially conform to the material allegations of the indictment.

By the arrest of the defendant and the filing of the indictment, no presumption whatsoever arises to indicate that the defendant is guilty or that he had any connection or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings, and that presumption goes to the jury room, until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. This rule as I have stated applies to every material element of the offense.

A reasonable doubt I will define to you in the legal definition, but I will give you a short definition which is mine. A reasonable doubt is a doubt that you can assign a good reason for having. The legal definition is that a reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it

must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture, for it is difficult to prove a thing to an absolute certainty. [383]

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you. Without it being restated or repeated again, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all of the instructions that are given to you.

In judging the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you might reach a contrary conclusion. Whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial and to the evidence which has been introduced. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evi- [384] dence affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of the evidence or testimony of any witness, as may be dictated to you by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which the witnesses testified, as I have heretofore delineated them to you, and in addition to that the relation that he might bear to the Government or to the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other witnesses, or other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jurors should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses, but you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women. [385]

The interest of a defendant in the result of the action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it raises in your minds a reasonable doubt as to whether the crime charged was committed by such defendant to entitle him to an acquittal.

You cannot base a verdict of guilt upon extra-judicial oral admissions, or statements of a defendant alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti and if you do not believe after a consideration of all the evidence that the body of the crime or the corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

The mere fact that a witness is connected with the Government of the United States in any capacity whatsoever does not mean that the testimony of such a witness is entitled to any greater weight or credence by reason of that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider [386] the testimony of such person if he were not so employed.

Although counsel did not argue the matter, it was indicated by the testimony that the defendant was considering the defense of entrapment. By raising such defense he does not admit the facts charged but such acts must be proven to your satisfaction beyond a reasonable from the evidence in the case and under these instructions. If, however, you so find that he committed such act as charged then you must consider whether he was entrapped into committing them.

So far as entrapment is concerned, it has been judicially defined as follows:

"The first duty of the officers of the law is to prevent and not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing. It must not be their endeavor to cause or to create crime in order to punish, and it is unconscionably contrary to the public policy and to the established law of the land to punish a man for the commission of an offense the like of which he would never be guilty, either in thought or deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it. Decoys may be used to entrap criminals and to present opportunity to one intending or willing to commit a crime, but decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates not with the accused but is conceived in the minds of the Government officers and the accused is, by persuasion, deceitful representation or inducement, lured into the commission of a criminal act the Government is estopped from sound public policy in the prosecution thereof."

So that if you should find that there was such entrapment then the defendant is entitled to your verdict of not guilty, even though you may find beyond a reasonable doubt that he did the acts alleged.

Coming now to the specific charges in this case, the indictment in this case has been brought under the Federal Statute known as 18 U.S.C., Section 207. The pertinent portion of it reads as follows:

"Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in

any official capacity, under or by virtue of the authority of any department or office of the Government thereof; * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may [388] at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be * * * guilty of a crime.

An appropriate punishment is provided, but you are not to be concerned in your reasoning or your conclusion with the punishment which the law provides or permits.

The indictment in this case consists of two counts. It has been read to you and hence I will not re-read it. Both counts have been brought under the same statute which I have just read to you.

The first count charges that on or about October 3, 1946 the defendant asked for a bribe in the sum of \$100 from one Hubert Tomson, and the second count charges that on or about October 18, 1946 he received \$100 from Hubert Tomson as a bribe, all contrary to the statute.

The gravamen, or material part, of the offense charged in Counts 1 and 2 of the indictment in this case is, in Count 1, the asking of a bribe, and in Count 2, the accepting or receiving of a bribe by a person acting on behalf of the United States for the purpose and with the intent on the part of the defendant of influencing his official conduct.

You are instructed that to fall within the meaning of the section of the Criminal Code, under which the defendant has been indicted, it is not necessary that he be an officer [389] of the United States, but it is sufficient if he is a person acting for or on behalf of the United States in

any official capacity under the authority of any department or office of the Government. The United States Veterans Administration is and was on all dates material hereto an office, department, or agency of the United States.

In respect to Counts 1 and 2 of this indictment, you are first to ascertain from the evidence and the logical and reasonable inferences that can be drawn therefrom, as to whether or not the defendant, on the dates on which it is alleged the defendant asked and received the bribe, was a person acting for and on behalf of the United States in the official capacity of Orthopedic Physician in the Out-patient Department of the United States Veterans Administration Center, West Los Angeles, California.

Next, you should ascertain from the evidence whether or not his official duties required or permitted the defendant to act in any way in connection with the number or quantity of shoes to be delivered by Tomsone under the contract which has been introduced in evidence.

Each of these elements must be found to exist beyond a reasonable doubt.

Every action that is within the range of official duty comes within the purview of the bribery statute. To constitute official action, it is not necessary that it be pre-[390] scribed by statute. It may be required by some written rule or regulation, or it might also be required by established usage which constituted the law governing the United States Veterans Administration and fixed the duties of those engaged in its activities.

If you find the matters as covered in the preceding instructions, you should next ascertain from all of the evidence offered, and beyond a reasonable doubt, whether

or not the defendant asked for or accepted and received money, to wit, a bribe, with the intent to influence the decisions and actions of the defendant in the exercise or carrying out of his official duties as charged in the indictment.

It is not necessary for you to find that the defendant's design or action was actually influenced by the asking or the receipt of a gratuity, but it is a violation of the statute if the defendant intended to have his official action influenced by the receipt of a gratuity.

You are instructed that the guilt of the defendant depends upon proof that he either asked, or accepted, or received a gratuity as alleged in the indictment and does not depend upon the degree of receptivity of the mind of the person of whom the gratuity was asked or from whom it was accepted or received.

A public officer or a person acting for or on behalf of the United States cannot be acquitted of accepting a bribe [391] because he was legally bound to do that which he agreed to accept a bribe for doing.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question which depends upon evidence presented to them. You are expected to use your good sense, to consider the evidence for the purpose only for which it was admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no doubt remains the Government is entitled to the verdict,

for to the jury, to you, belongs exclusively the duty of determining the facts.

If the judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either the Government or the defendant in this case, you will not suffer yourself to be influenced by that suggestion. He has not expressed or intended to express, or intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, what inferences should be drawn from the evidence adduced or not, and if any expression of the judge has seemed to indicate to you any opinion relating to [392] any of these matters you are instructed to disregard it.

You should not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered or rejected or which has been stricken. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom as heretofore directed in these instructions.

It is your duty as jurors to consult one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment in the case. To each of you I would say that you must decide the case for yourself, but should do so only after a consideration of the case with your fellow-jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you

should vote either way, nor be inslued in so voting, for the single reason that a majority of the jurors are in favor of such a vote. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of other jurors. [393]

Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom, not in the opinions which any of you may have when you leave this room. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end the Court would remind you, in conclusion, that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

After the bailiffs have been sworn you will retire to the jury room, you will select one of your number to act as foreman, and when you have agreed upon a verdict the foreman will fill in the blanks in the form which the bailiff will hand to you indicating what your conclusion is. You may find the defendant not guilty as to both counts, guilty as to one count and not guilty as to the other count, or guilty as to both counts. After you have reached the conclusion and filled out the verdict the foreman will sign it and each of you will return to the courtroom.

Counsel have heretofore indicated their objections to the instructions as given in Chambers and they will be deemed to have been made in court in the presence of the

jury. If there are any further objections you may state them at this time. [394]

Mr. Sullivan: No further objections as far as the defendant is concerned, your Honor.

Mr. Neukom: None, your Honor.

The Court: The Clerk will swear the bailiffs.

(At this point two bailiffs were duly sworn by the Clerk.)

The Court: If the jurors decide they wish to see the exhibits the bailiff will call upon the Clerk to furnish them.

The bailiff will take the jury to lunch and then take them to the jury room for deliberation.

(The jury retired from the courtroom at 12:15 o'clock p. m.) [395]

Los Angeles, California; December 13, 1946; 3:35 o'clock P. M.

The Court: The record will show the defendant Gage is present in person and by counsel.

Mr. Bailiff?

The Bailiff: The jury has reached a verdict, your Honor.

The Court: The record will show that each of the jurors has returned to his or her place in the box.

Mr. Foreman, has the jury arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you fold the verdict and hand it to the bailiff?

(The verdict was passed to the Court.)

The Court: The Clerk will read the verdict.

The Clerk: "In the District Court of the United States, Southern District of California, Central Division.

"United States of America, Plaintiff, v. Theodore S. Gage, Defendant.

"No. 19055, Criminal. Verdict.

"We, the jury in the above-entitled cause, find the defendant, Theodore S. Gage, guilty as charged in the first count of the indictment, and guilty as charged in the second count of the indictment.

"Dated: Los Angeles, California. December 13, 1946.

"Harry D. Dudding, Foreman of the Jury." [396]

The Court: The Clerk will poll the jury.

The Clerk: Will each juror answer yes or no if this is his or her verdict.

(At this point the Clerk duly polled the jury, each answering "yes.")

The Court: Very well. The jury is excused. Thank you for your time and attendance. You will be excused until notified.

(Whereupon the jury retired from the courtroom at 3:40 o'clock p. m.)

The Court: The defendant will stand committed. The matter of sentence will be continued to and set for December 30 at the hour of 2:00 o'clock p. m.

Mr. Sullivan: Your Honor, I wonder if the Court will consider referring this matter to the Probation Department.

The Court: I will of my own motion refer it to the Probation Department, but the defendant will stand committed, and his bond will be exonerated. The matter will be continued until December 30th for sentence.

Mr. Sullivan: That is at what hour, your Honor?

The Court. 2:00 o'clock p. m. of that day.

[Endorsed]: Filed Mar. 18, 1947. [397]

[Endorsed]: No. 11532. United States Circuit Court of Appeals for the Ninth Circuit. Theodore S. Gage, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 25, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Appeal No. 11532

(Civil Action No. 19055. District Court, Southern
District of California, Central Division.)

THEODORE S. GAGE,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

APPELLANT'S STATEMENT OF POINTS ON
APPEAL

In accordance with Rule 19(6) of the Rules of this Court, appellant, Theodore S. Gage, hereby makes his statement of the points on which he intends to rely on appeal, as follows:

1. The indictment does not, nor does any count therein, state facts sufficient to constitute an offense against the United States.

2. The evidence is insufficient to establish the necessary elements of the offense charged, to-wit:

a. That appellant was acting in the capacity required by the statute under which he was convicted;

b. That appellant had the specific intent required by the statute under which he was convicted;

c. That appellant possessed the decision or action required by the statute under which he was convicted.

3. The evidence is insufficient to sustain the verdict and judgment.

4. The verdict and judgment were contrary to the law and the evidence.

5. The trial court erred in excluding the evidence of Fred Skill.

6. There was no specific finding that appellant was an officer of or acting for or on behalf of the United States in an official capacity, or that appellant possessed the decision or action required by the statute for a conviction thereunder, or that appellant possessed the specific intent required by the statute for a conviction thereunder.

7. Appellant was denied due process of law, as guaranteed by Amendments V and VI of the Constitution of the United States, in that:

a. The presumption contained in the statute, as construed and applied in this case, violated said Amendments;

b. There was no specific finding that appellant was an officer of or was acting for or on behalf of the United States in an official capacity;

c. There was no specific finding that appellant possessed the decision or action required by the statute for a conviction thereunder;

d. There was no specific finding that appellant possessed the specific intent required by the statute for a conviction thereunder;

e. Appellant was prevented from properly presenting his defense due to the mismanagement thereof by his trial counsel.

8. Appellant's trial counsel mismanaged and improperly presented the trial thereof to such extent as to necessitate a new trial.

9. The trial court erred in denying appellant's motion for a new trial, among other things, in the face of voluminous newly-discovered and subsequently elicited evidence by appellant's new attorney, submitted to the trial court at the hearing upon said motion, conclusively establishing that it was common gossip and general knowledge throughout the hospital where appellant was employed, that appellant had made many statements in and about said hospital to the effect that Tomsone, the Government's principal witness, was bribing persons in the hospital administration, and that appellant had made numerous statements to the effect that, and that it was generally known, that appellant was seeking to establish the same and to entrap said Tomsone, and to prevent the purchase of inferior materials sold to said hospital by said Tomsone, and that all of appellant's conduct was designed for said entrapment and for the benefit of the hospital, as aforesaid.

10. The trial court erred in denying appellant's motion in arrest of judgment.

11. The trial court erred in denying appellant's motion for acquittal.

Dated: May 1, 1947.

JOSEPH J. CUMMINS

Attorney for Appellant, Theodore S. Gage

Service acknowledged May 1, 1947. James M. Carter, United States Attorney; Arthur Livingston and Norman W. Neukom, Assistant U. S. Attorneys; by L. Wayne Thomas, Chief Clerk, Attorneys for Respondent.

[Endorsed]: Filed May 2, 1947. Paul P. O'Brien, Clerk.

No. 11532.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JOSEPH J. CUMMINS,

739 South Hope Street, Los Angeles 14,

Attorney for Appellant.

FILED

SEP 27 1947

PAUL P. O'BRIEN,

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206

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No. 11532.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable The Ninth Circuit Court of Appeals of
the United States:*

This is an appeal by appellant, Dr. Theodore S. Gage, an orthopedic physician and surgeon, from a conviction under the Federal bribery statute (18 U. S. C., Sec. 207), the pertinent provisions of which read as follows:

“Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity under or by virtue of the authority of any department or office of the Government thereof * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, action, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be * * * guilty of a crime.”

The conviction is based upon an indictment in two counts. In substance, count one charges appellant with asking for, and count two charges appellant with accepting or receiving a bribe from the Government's chief witness, Hubert Tomsone, while appellant was employed as an orthopedic physician and surgeon in the Out-Patient Department of the United States Veterans' Administration, West Los Angeles, California (sometimes hereinafter referred to as "Veterans' Administration"), with intent to have his, appellant's, decision and action on matters which may by law be brought before him in his official capacity, namely, matters of prescribing orthopedic shoes and devices at said Veterans' Administration, influenced thereby.

Appellant was convicted on both counts of said indictment and sentenced to imprisonment for a term of one year on Count One and for a term of one day on Count Two, said sentences to commence and run concurrently, and was in addition fined \$1.00 on each of said counts.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225, U. S. Code.

Statement of the Case.

Appellant Dr. Gage is an M. D., specializing as an orthopedic physician and surgeon, having been engaged in the practice of medicine for nearly twenty years with an unblemished record.

The Government's chief witness, Hubert Tomsone, upon whose contradicted testimony of conversations had solely between himself and appellant this entire conviction rests, was and is a manufacturer of orthopedic shoes and

devices under an exclusive written contract with said Veterans' Administration.

Appellant was honorably discharged from the Armed Forces of the United States in Southern California in the spring of 1946 [Tr. p. 202], after four years of service at home and overseas in the medical corps assigned to orthopedic surgery [Tr. p. 201]. He hoped to remain in Southern California and applied for a position at said Veterans' Administration in August, 1946, while preparing himself for admission before the State Board of Medical Examiners for the State of California with the intention that upon such admission he would enter private practice [Tr. p. 204]. The uncontradicted testimony shows that appellant was employed by the Veterans' Administration as an orthopedic physician and surgeon, in which field he had specialized, about August 5, 1946 [Tr. p. 204] upon the understanding with Dr. Long, Chief of the Out-Patient Department thereof, that he, appellant, was accepting the same as an interim position until he passed said California State Board examination [Tr. p. 204].

The contention of the prosecution, based solely upon the testimony of the aforesaid Hubert Tomsone, was that on or about September 11, 1946, the second time appellant ever saw said Tomsone, appellant commenced to solicit Tomsone for a bribe upon the promise that appellant would, by virtue of his authority to prescribe orthopedic shoes and devices, increase the sale thereof, and that thereafter, on or about October 18, 1946, appellant accepted such a bribe from Tomsone in the sum of \$100.00, being, according to Tomsone, the first payment of a \$100.00 per week agreement therefor.

Appellant's defense throughout the trial was, and still is, that Tomsone attempted to bribe him, that he was conducting an investigation of Tomsone, and that he took said \$100 from Tomsone as part of his said scheme to entrap him.

It was and is admitted that on or about October 18, 1946, appellant took \$100 from Tomsone in the parking lot of the said Veterans' Administration; that immediately thereafter appellant went directly to his office and was there apprehended by agents of the Federal Bureau of Investigation, and that the said money was then in his possession. The only testimony of the agents of the Federal Bureau of Investigation was as to these physical facts. However, the uncontradicted testimony established the fact that after he received the money from Tomsone appellant was only in his office a couple of minutes before said Federal Bureau of Investigation agents entered and arrested him [Tr. p. 257]. Appellant testified, consistent with his defense, to the effect that he was making an investigation and trying to entrap Tomsone; that he intended to "go to Dr. Long (the chief of the Out-Patient Department) and put it on his desk and say, 'Now hear the whole story' " [Tr. p. 257], but was prevented from carrying this out because he was arrested so quickly [Tr. p. 260]. This is completely consistent with the appellant's defense, and intent of appellant to have his official actions influenced by the receipt of said money certainly cannot be derived from this testimony of the Federal Bureau of Investigation agents as to said physical circumstances.

The only testimony in the entire record inconsistent with appellant's aforesaid defense is the testimony of Tomsone

himself that (1), appellant rather than Tomsone was the solicitor of the bribe, and (2), that appellant had the intent to have his decision and action on matters which may by law be brought before him in his official capacity, influenced thereby. This testimony is contained solely in Tomsone's version of conversations had between appellant and himself at which, according to Tomsone, no other persons were present. There is no corroboration of Tomsone's testimony as to the content of these conversations. This entire conviction, therefore, rests upon that testimony of Tomsone's.

Appellant categorically denied he solicited Tomsone for a bribe [Tr. pp. 237, 238, 240, 251, 252, 257 and 258], testified throughout the trial that Tomsone attempted to bribe him [Tr. pp. 245, 246], and that he accepted the sum of \$100.00 from Tomsone as part of his investigation and plan on entrapping him.

Each and all of the statements of Tomsone contained in his testimony of said conversations bearing on the question of appellant's solicitation or intent were categorically denied by appellant [Tr. pp. 237, 238, 240, 251, 252, 257, 258]. As heretofore stated, appellant also testified that Tomsone attempted to bribe him [Tr. pp. 245, 246].

Three witnesses testified that the reputation of said Hubert Tomsone in the community for truth, honesty and integrity was very bad and that they would not believe him under oath [Tr. pp. 298, 302 and 309].

Two character witnesses were called on behalf of Tomsone. The first, John Harder, testified that he based his testimony as to Tomsone's reputation upon the opinion

of only one person, one Walter Bitner [Tr. pp. 330, 331], with whom Tomsone had only occasional business contact [Tr. p. 331]. The second character witness for Tomsone also admitted, under cross-examination, that his testimony regarding Tomsone's reputation was based upon the statement of only one person, one Alfred Russo [Tr. pp. 336, 337].

Three witnesses testified that appellant's reputation in the community for truth, honesty and integrity was very good [Tr. pp. 196, 197, 198, 199]. This testimony is uncontradicted.

According to Tomsone's own testimony, when appellant entered upon his duties as an orthopedic physician and surgeon at said Veterans' Administration in the early part of August, 1946, Tomsone was away on a vacation [Tr. pp. 137, 138], and admittedly did not return to the City of Los Angeles and/or did not meet appellant until the Friday after Labor Day, which was September 6, 1946 [Tr. pp. 137, 138], which was one month after appellant became connected with said Veterans' Administration.

The uncontradicted testimony shows that prior to Tomsone's return from his vacation appellant had discovered that Tomsone's work was defective and slovenly and not in accordance with the specifications of his contract [Tr. p. 235], and that there were numerous complaints of Tomsone's delivered products from veterans by virtue of improper fits and modifications [Tr. p. 232]; that appellant had informed Tomsone at their first meeting of the aforesaid facts [Tr. p. 232], which later complaint resulted in an open brawl between the appellant and the said Government's chief witness, which brawl is admitted

by Tomsone himself [Tr. p. 138]; that appellant made universal complaints to virtually everyone in authority and more particularly to his associates that the shoes which Tomsone was deliverng to the Veterans' Administration were of poor quality and that Tomsone was making improper charges to the Government, which testimony of said complaints is corroborated by the testimony of doctors at said Veterans' Administration [Tr. pp. 286, 289], and by Gordon L. Howe, Supply Officer at said Veterans' Administration and a Government witness [Tr. pp. 94, 95]; that appellant was asked by said Gordon L. Howe to rewrite said Tomsone contract [Tr. pp. 263, 237], and that appellant informed Tomsone that he was asked to rewrite the contract [Tr. p. 237].

The Government's chief witness Hubert Tomsone, testifying as to various of the conversations between himself and appellant, stated that appellant commenced his solicitation for a bribe on the 10th of September, 1946, the second time he had ever seen appellant and slightly more than one month after appellant became connected with the Veterans' Administration [Tr. p. 139]. It is significant to note that this was only four days after the bitter argument between them at their first meeting, which argument was expressly admitted by Tomsone himself as heretofore mentioned [Tr. p. 138].

It is further significant to here note that the testimony unequivocally supported by the Government's own witnesses established: (1) that when appellant was employed by the said Veterans' Administration he was the only doctor in the Orthopedic Department, but that after he had worked there alone for some time appellant asked for and was assigned two other doctors in his department

to assist him, each of whom had the same authority as appellant to independently examine and prescribe shoes and orthopedic devices under said Tomsone contract, and (2) that thereafter appellant, in sheer disgust with the quality and nature of Tomsone's shoes and orthopedic devices, intended to resign and did prepare a written resignation from said Veterans' Administration on or about October 2, 1946.

Dr. Frank L. Long, Chief Medical Officer of the Medical Department and Chief of the Out-Patient Department of said Veterans' Administration [Tr. p. 108], a Government witness, unequivocally corroborated appellant's testimony that appellant asked him to assign and that he, Dr. Long, assigned two other doctors to help appellant in his department [Tr. p. 121] and that each of said doctors had the same authority as appellant to independently examine and to determine and prescribe orthopedic shoes and devices [Tr. p. 122]. A further uncontradicted fact is, and this is corroborated by the testimony of Arthur J. Nie, Medical Administrative Officer of the Medical Division of the Los Angeles Veterans' Administration Regional Office [Tr. p. 321], and by the written request for resignation of appellant signed by Arthur J. Nie under date of October 2, 1946 [Deft. Ex. A in evidence; Tr. pp. 321, 322], that appellant decided to resign from the Veterans' Administration and that on or about October 2, 1946 he prepared a written resignation from his position at said hospital, which he was influenced to withhold by his superiors [Tr. p. 315]. Appellant testified he had decided to resign in sheer exasperation because of the low quality of Tomsone's shoes and devices and their non-conformance with the specifications of the exclusive con-

tract which Tomsone had with said Veterans' Administration [Tr. pp. 246, 247].

The significance of said facts is that they expose Tomsone's version of the conversations had between him and appellant as completely inconceivable and inherently improbable. It is inconceivable and inherently improbable that appellant would take the risk of commencing the solicitation of a bribe from a complete stranger whom he had met just once before upon an occasion which terminated in a bitter argument. Further, if Tomsone's testimony that appellant sought and accepted a bribe from him upon the promise that he would increase the sale of Tomsone's shoes by virtue of his authority to prescribe the same is true, why would appellant ask for and accept additional doctors in his department with the same independent authority to prescribe such shoes and thus render himself incapable of performing the very promise which, according to Tomsone's testimony, was the basis of the alleged bribe? Finally, how could appellant have the intent to accept a weekly bribe from Tomsone in return for prescribing additional shoes and at the same time have the intent to resign from the Veterans' Administration?

The only testimony, therefore, in the entire record of this case, to the effect that appellant intended to have his official conduct influenced rests upon the sole word of the Government's chief witness, Tomsone, a man whose reputation for truth, honesty and integrity was severely attacked at the trial and who had a clear motive for getting appellant out of the way, and whose inherently improbable testimony of said conversations at which only he and appellant were present is sharply contradicted

by appellant's testimony thereof and the uncontradictable evidence hereinabove and hereinafter referred to. In view of the foregoing, the evidence in this case can not and does not support the verdict and judgment.

But this appeal does not alone rest upon the legal insufficiency of the evidence that was in possession of the jury. Most important of all is the newly discovered evidence obtained by appellant's new counsel after the trial, to the effect that during the period of his entire connection with said Veterans' Administration, *i. e.*, during the period that Tomsone testified he was engaged in bribery activities, appellant was engaged in an investigation of the orthopedic setup of the Veterans' Administration and of Hubert Tomsone, the Government's chief witness, and that during said time appellant had on numerous occasions stated to certain of his colleagues and superiors that he felt Tomsone was "paying somebody off," and that he was trying to get him and that he was undertaking an investigation and finding out certain things and that as a consequence there would probably be "some fireworks" or "fur flying" [Tr. pp. 19-60].

This evidence, which was never before the jury, thoroughly undermines the already insufficient and sole foundation of this conviction, Tomsone's testimony as to those private conversations, and completely establishes the lack of the crucial element of intent. Said evidence was concealed and suppressed at the time of trial for one reason or another, and was only obtained by appellant's new

counsel by virtue of telephone conversations recorded on a sound transcriber attached to said counsel's telephone under conditions where the witnesses were unaware of the same. Said evidence was presented to the trial court upon motion for a new trial, which was denied.

In addition to the foregoing newly discovered evidence, and also subsequent to the trial of this case, appellant's new attorney discovered the record of two convictions of theft of the Government's chief witness, Hubert Tomsone, for which said Tomsone served two sentences in the Long Beach City jail. This was also submitted to the trial court upon the motion for a new trial, which motion was denied.

Specification of Errors.

1. The trial court abused its discretion in denying appellant's motion for a new trial based upon newly discovered evidence [Tr. pp. 14; 15-18].

(a) Evidence that appellant was engaged in an investigation to expose and entrap Tomsone, the Government's chief witness [Tr. pp. 19-60].

(b) The records of two convictions of theft of the Government's chief witness, Hubert Tomsone, and his service of two sentences therefor [Tr. p. 18].

2. The trial court erred in excluding the testimony of Fred Skill and preventing him from completing his testimony [Tr. pp. 18; 295-299].

3. The evidence does not support the verdict and judgment.

ARGUMENT.

I.

The Trial Court Abused Its Discretion in Denying Appellant's Motion for a New Trial Based Upon Newly Discovered Evidence.

A. EVIDENCE THAT APPELLANT WAS ENGAGED IN AN INVESTIGATION TO EXPOSE AND ENTRAP TOMSONE, THE GOVERNMENT'S CHIEF WITNESS.

Subsequent to the trial, appellant's new attorney, Joseph J. Cummins, by means of telephone conversations recorded on a sound transcriber attached to said attorney's telephone elicited admissions from various witnesses which testimony was withheld and suppressed by said witnesses at the time of the trial and did obtain testimony from two witnesses who were not present at the trial. Because of the suppression of this evidence at the time of trial the same was not presented to the jury and was only obtained subsequent thereto by appellant's new attorney under said circumstances whereby said witnesses were unaware of the fact that their testimony was being recorded.

This newly discovered evidence consists of statements made to defendant's new counsel, Joseph J. Cummins, by disinterested professional men employed at said Veterans' Administration. namely, Drs. M. J. Hurst, David Levine, Charles Strachan, Theodore Kane and Colonel Strayder.

The entire telephone conversations of these men with said Joseph J. Cummins, as recorded by a recording machine attached to the telephone of said Joseph J. Cummins at the time of said conversations, and submitted to the trial court upon a motion for a new trial, are set forth on pages 19-60 of the Transcript.

These conversations establish that during the period of his connection with said Veterans' Administration, *i. e.*, during the period he is accused of engaging in bribery activities, appellant had on numerous occasions stated to certain of his colleagues and superiors that he felt Tom-sone was "paying somebody off" and that he was trying to get him, and that he was undertaking an investigation and finding out certain things and that as a consequence there would probably be some "fireworks" or "fur flying." The pertinent portions of these conversations are here set forth:

Portions of Transcription of Conversations Between Joseph J. Cummins and Dr. M. J. Hurst.

"Hello.

JJC. Dr. Hurst?

Dr. H. Yes.

JJC. My name is Joseph Cummins. I'm Dr. Gage's new attorney. I wanted to ask you a question, because on this question might be predicated our ability to get him a new trial. Did you ever hear in any of the bull sessions or discussions around there, did you ever hear Dr. Gage say that he was making an investigation, and that there might be 'fur flying' or 'hell popping,' or words to that effect?

Dr. H. Yes sir, I heard some—

JJC. Now many times have you heard him say that?

Dr. H. Well I'd say at least two times, maybe three.

JJC. Can you recall, doctor, who all was present when he made those statements? Was Dr. Kuhn there?

Dr. H. I think he was, I know—

JJC. Was Dr. Levine there?

Dr. H. I think he was. I know it happened—once when I was—when just the two of us were alone.

JJC. Uh-huh. Did he ever tell you that he was trying to get Tomson; that he felt that Tomson was paying somebody off and he was trying to get him?

Dr. H. Yes, uh huh.” [Tr. p. 54.]

Portions of Transcription of Conversation Between Joseph J. Cummins and Dr. David Levine.

“JJC. Did he ever complain to you how bad Tomson’s shoes were?

Dr. L. Oh yes, yes he mentioned that not only in my presence but that and several others at the same time.

JJC. He did.

Dr. L. Oh, yes.

JJC. On more than one occasion?

Dr. L. On several occasions.

JJC. Uh huh. And did he say what he was going to do about it?

Dr. L. Yes, he mentioned the fact that—that there was something . . . there was something fishy in Denmark—if I may use that term—

JJC. Well, sure.

Dr. L. And that he was finding out certain things that were going on, and . . . although he didn’t expand upon that—

JJC. Uh huh.

Dr. L. And that as a consequence there would probably be some fire works. That’s about the way he put it. [38]

JJC. He said there was going to be some ‘fire works’?

Dr. L. Very likely he said there would be.

JJC. Uh huh.

Dr. L. And then he told me on one occasion that he had sent a letter to Washington.

JJC. Uh huh.

Dr. L. And, subsequently he told me that he had been called into the chief medical officer's office and had been informed that the chief medical officer there had received a reply to that letter but would not divulge it to him.

JJC. Uh huh.

Dr. L. The letter, in other words, went through indirect channels. He claims that he never saw that letter. That he never personally received a reply to it from Washington which was—made him rather indignant. He felt that this was a personal matter and he told them that he had not gone through channels.

JJC. Uh huh.

Dr. L. And that therefore the letter had been properly sent through the channels. That is the reply had been properly sent through channels. But he said the contents of the letter were not divulged to him. He was told to . . . more or less . . . keep out of things that didn't concern him . . . Something along that line.

JJC. You are referring to Dr. Long.

Dr. L. That's right.

JJC. Uh huh.

Dr. L. This is indirect—this is what Gage told us.

JJC. Yes, naturally. 'He told us.' You mean there were others of you doctors present?

Dr. L. Well, I don't know whether at the same time or individually, [39] but Dr. Kane, Dr.

Strachan, Dr. Kuhn were those to whom he talked mostly."

[Tr. pp. 33-35.]

* * * * *

"Dr. L. Oh, he told me—well he mentioned even before that—as I recall it—that he had apparently hit upon something . . . and that he was going to follow it through."

[Tr. p. 37.]

Portions of Transcription of Conversation Between Joseph J. Cummins and Dr. Charles Strachan.

"Dr. S. Hello.

JJC. Hello, this is Joseph Cummins. Remember I called you last week at home regarding Dr. Gage.

Dr. S. Yes.

JJC. I just want to ask you another question that didn't come up at that time, doctor. Talking to Dr. Levine and Dr. Hurst they told me something that sounded insignificant to them but it might be an important item, and that's this: That during their bull sessions around the hospital Dr. Gage made the statement on more than one occasion that he is working on something and that one of these days hell will be popping or there'll be fur flying, or words to that effect. Did you hear such a statement?

Dr. S. Well I don't remember anything specific.

JJC. Not specific, but something that sounded like that.

Dr. S. Oh, yes, sort of intimated something like that.

JJC. Uh huh. That—you don't remember the exact words—that's what you mean.

Dr. S. No I don't remember any exact words.

JJC. No. But the idea, you do recall him having made such a statement?

Dr. S. Yes.”

[Tr. pp. 52-53.]

Portions of Transcription of Conversation Between Joseph
J. Cummins and Dr. Theodore Kane.

“Dr. K. I don’t recall it as such. I know that he was trying to—how should I word it—he was complaining about the quality of the work, and he was checking on that. That was most of the gist of his conversation. You know that letter that he wrote.”
[Tr. p. 58.]

* * * * *

“Dr. K. Then I remember when he came back and said there had been an answer to that letter and he wasn’t told what it was—something like that—I mean the stuff that you already know.

JJC. Uh huh. [61]

Dr. K. My impression was that he was waiting for that letter and there would be some hell to pay in regard to the contracts, etc. Something he was trying to find out about those—”

[Tr. p. 60.]

* * * * *

“Dr. K. Yeh. He was always complaining about the quality of his work.

JJC. Uh huh. And were any of the other doctors there?

Dr. K. If I’m not mistaken there would be half a dozen of us in the room. He’d come in and say, ‘Well, gee whiskers, I had a case yesterday or this morning, or something, and that was sure a lousey job. He sure does this and he sure does that.’ I mean it was just general conversation.”

[Tr. p. 26.]

Portions of Transcription of Conversation Between Joseph
J. Cummins and Dr. Colonel Strayder.

"Dr. S. Well, right after I started to work down there I went off on leave. While I was working down there I didn't know just what was going on. He said the contract for the shoes was not good. He was trying to get the contract broken. He wanted the Government to buy shoes from anybody that would make them."

[Tr. p. 48.]

* * * * *

"JJC. Did he complain to you about the type of shoes that Tomsone was delivering to the hospital?

Dr. S. Yes, that was common talk . . . Everybody knew *that*.

JJC. Did he express himself that he thought perhaps Tomsone was sticking there because he was paying somebody off?

Dr. S. Well, he didn't know.

JJC. He told me he told *you* that prior to his arrest.

Dr. S. He might have mentioned it to me.

JJC. Do you remember him saying that to you?

Dr. S. Well, I couldn't say. Really, I wouldn't know for sure whether he did say that.

JJC. He told you that he was working—making an investigation—or words to that effect.

Dr. S. He talked about it all the time. Whether he had that in mind or not I couldn't be able to say for sure."

[Tr. p. 49.]

* * * * *

“JJC. What was the worst he said about Tom-sone and his shoes?

Dr. S. They were lousy shoes, or words to that effect . . .

JJC. He tells me that he told you that the only way a man could put shoes like that into the the hospital is that he was paying somebody off. Do you remember him saying that to you?

Dr. S. He might have, but if he did, of course, that would be merely a supposition.

(Inaudible conversation.)

JJC. How many times did he make such complaints to you?

Dr. S. Oh, I wouldn't know. Probably one or two times, when he'd bring a shoe over there for me to look at . . . he turned them down . . . I wouldn't know. The veteran wouldn't like the shoe and he would bring it back in. He'd send them back and have them fixed over.

JJC. And during that conversation he might have said to you that the only way a man could bring a shoe like this into the Administration would be that he's paying somebody off, or something like that?

Dr. S. I don't recall that. I don't recall him ever saying that. I wouldn't know.

JJC. He might have said it?

Dr. S. He might have said it in just ordinary conversation . . . He was driving at an investigation—to find out what, I didn't know . . . We couldn't do anything about it. All we could do was holler about it. We all did that. He didn't let the contract. He didn't have anything to say about it.”

[Tr. pp. 50-51.]

“JJC. Well, you say he complained about Tomson’s work. The work was bad and that—did he say, ‘He’d like to have a change—would like to have somebody else do it, or this, or that’?

Dr. S. Oh, yes, things similar to that. Yes, that’s true.”

[Tr. p. 27.]

A reading of the complete transcriptions of these conversations, Transcript pages 19-60, strikingly reveals the reluctance, hesitancy and avoidance of these witnesses toward disclosure of any nature, and particularly of the pertinent matters of this case, even under conditions where they did not know that their conversations were being recorded. The extent of their withholding and suppression of this vital evidence at the time of trial, when they would have to testify in the open and were subjected to various fears and pressures, is well illustrated by the transcription of the telephone conversations between said Joseph J. Cummins and Dr. Ralph H. Kuhn. During the above quoted recorded conversations several of the doctors stated that said Dr. Kuhn was present at the times appellant made the aforesaid vital statements. Dr. Levine stated that said Dr. Kuhn was one of the men to whom appellant talked mostly. [Tr. p. 35.] Dr. Hurst stated that Dr. Kuhn was present when appellant stated that he was “making an investigation and that there might be fur flying and hell popping.” [Tr. p. 54.] Yet even at the time of said recorded telephone conversations Dr. Kuhn was afraid to, and refused to talk. Because the recorded conversation with Dr. Kuhn even at this post trial period so vividly reproduces the attitude at the time of trial of the other persons, it is here set forth:

Conversation of January 2, 1947.

JJC. My name is Joseph Cummins. I'm an attorney. I've just been substituted in in the Dr. Gage case.

Dr. K. Yes.

JJC. Are you in a position to speak more or less freely right now . . . I want to ask you a couple of questions.

Dr. K: Well—

JJC. Or would you rather I spoke to you at home?

Dr. K. What's that?

JJC. Would you rather I spoke to you at home?

Dr. K. Well, I'm not at home very much.

JJC. Well, I'll ask you—Frankly, I'm trying to get Dr. Gage a new trial . . . and . . . I spoke to some of the other men in your department and asked them a couple of questions very frankly, and they're on these lines: 'Did you ever hear Dr. Gage make the statement that he's making an investigation and that there'll be "fur flying" or there'll be "fireworks" or "hell will be popping," or words to that effect?'

Dr. K. Well, I tell you, Mr. Cummins, I don't know that I want to go into this thing. There are a lot of complicating factors entering into it, and I might be willing to talk to you some time but not now and not over the 'phone.

JJC. All right. Any way you say, Doctor. Would you be kind enough . . . I gave you my home 'phone number, to call me at your convenience?

Dr. K. All right, just one second . . . Now, what's the 'phone number?

JJC. My office number is TRinity 0431.

Dr. K. Just one second . . . TRinity [47]

JJC. 0431.

Dr. K. 0431.

JJC. My residence is BRadshaw 24552.

Dr. K. 245—

JJC. 52.

Dr. K. 24552. I'll call you.

JJC. And I'll appreciate it.

Dr. K. Thank you.

JJC. Thank you, sir." (*Tr. pp. 45-46*)

Conversation of January 6, 1947.

"JJC. Dr. Kuhn, this is Mr. Cummins.

Dr. K. Oh, yes . . . yes. Uh-huh.

JJC. This is January 6th, and my affidavits to Judge Hall have to be in on the 8th.

Dr. K. Yah, well, now, I'll tell you, Mr. Cummins. I've talked this situation over with some of my people who are rather influential here in the city, and I believe I'd rather keep out of it.

JJC. Oh, it's not a question, Doctor, of keeping out of it. I don't want to drag you into anything. I merely want to ask you one question . . .

Dr. K. Well, I . . .

JJC. And that is this. If you don't want to answer it, it's all right. 'Did you ever hear—'

Dr. K. Mr. Cummins, I don't care to get into it, and I agreed to call you, but then, talking things over . . . people advise me not to become involved. You see, I've been in court on this case and I feel that I don't care to go again.

JJC. Well, 'Did you ever hear Dr. Gage—' [48]

Dr. K. Well, I'll talk to you some other time, Mr. Cummins. Some time possibly when I'm free and you're free.

JJC. Well, I'll have to subpoena you, Doctor, and take your deposition.

Dr. K. O.K. Goodbye.

JJC. Thank you, sir." (Tr. pp. 46-47)

The testimony of Doctors ^{Hurst} ~~Hunt~~, Levine, Strachan, Kane and Strayder clearly establishes the basis of appellant's defense—that he had no intent to accept a bribe from Tomsone for the purpose of having his official conduct influenced thereby.

In the case of *People v. Skaggs*, 80 Adv. Cal. App. 93, a strikingly similar situation was presented. Because of the apt language of that court in stressing the vital nature of evidence similar to that here considered, we wish to quote the following therefrom:

"It is next contended by appellant that there is ample evidenc^e to show that he feigned complicity in a bribe agreement, accepted the \$500 and permitted Petillo to believe that he intended to use the money to protect him from the impending prosecution for his alleged assault upon the marines, all for the sole purpose of securing evidence upon which to prosecute Petillo for offering and giving a bribe (Pen. Code, §67). The record reflects that such was the whole defense theory at the trial, and as stated by respondent, 'If appellant was pretending to accept a bribe then he is of course not guilty.' It is unnecessary to here set forth the evidence offered in support of this theory, as we have hereinbefore narrated it in detail. Suffice it to now state that it was established at the trial that prior to keeping his appointment with Petillo to receive the money, ap-

pellant informed no less than three other police officers that he thought Petillo 'was giving me a play for a pay off.' That appellant said to Sergeant Brunty, 'I am supposed to see him tonight. I think he is going to try to give me some money and will you go down and help me on the case?' Officer Brunty agreed if the night lieutenant at University Station approved. Both Officer Brunty and appellant sought out night Lieutenant Bowers and appellant asked his superior officer to send Brunty with him but the lieutenant stated that they 'were awful short tonight for men' and told appellant to 'go down there first and see what it is all about and then if you need help I will get you some help. If you take anybody with you that he doesn't know and if there is a deal on or setup why, he will be scared off.' *This and other testimony hereinbefore set forth and fully corroborated by Lieutenant Bowers, Sergeant Brunty and Officer Goodman is certainly at variance with the propensities and conduct of an officer who was wilfully and unlawfully about to accept a bribe. Bribe takers are not prone to ask for witnesses to their perfidy.*" (Italics ours.)

Said court then states:

"Appellant's defense was a vital issue in the case."
(*Ibid.*, p. 108.)

Likewise in the case at bar appellant's defense was a vital issue. If he pretended to take a bribe, then he is, of course, not guilty. The testimony of Doctors Hurst, Levine, Strachan, Kane and Strayden^c, which was suppressed at the time of trial and obtained for the first time after trial, is certainly at variance with the propensities and conduct of a person who was wilfully and unlawfully about to accept a bribe.

The newly discovered evidence in the case at bar establishing that appellant disclosed to numerous persons that he was engaged in a plan to entrap Tomsone, completely destroys ^{Tomsone's} ~~the~~ testimony of the secret conversations between himself and appellant which is the sole foundation of this conviction.

The intent of appellant at the time of the receipt of the money is the crucial element of the offense of bribery under the statute here involved.

United States v. Henry, 52 Fed. Supp. 161;

United States v. Boyer, 85 Fed. 425.

The denial of appellant's motion for a new trial upon the ground of the aforesaid newly discovered evidence under the circumstances of this case was an abuse of the trial court's discretion.

Martin v. United States, 17 F. (2d) 973;

Pettine v. Terr. of N. Mexico, 201 Fed. 489;

United States v. Miller, 61 Fed. Supp. 919.

The suppression of the above vital evidence during the trial and its discovery after trial makes the following language of the court in *Martin v. United States*, *supra*, at page 796 peculiarly applicable:

“In our opinion it is the duty of the trial court to grant a new trial where a witness at the original trial subsequently admits on oath that he committed perjury or even that he was mistaken in his testimony, provided that such testimony related to a ~~natural~~ ^{material} issue and was not cumulative.” (*Martin v. United States*, 17 F. (2d) 973.) (Italics ours.)

In *United States v. Miller, supra*, at page 924, the court in approving and applying *Martin v. United States, supra*, states:

“What the Court said in *Martin v. United States*, (5 Cir., 1927), 17 F. (2d) 973, 976, to some extent applies here:

“In our opinion it is the duty of the trial court to grant a new trial where a witness at the original trial subsequently admits on oath that he committed perjury or even that he was mistaken in his testimony, provided that such testimony related to a natural issue and was not cumulative. * * * There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so that, on a new trial there would be a strong circumstance in favor of the losing party that did not exist, and therefore could not have been shown, at the time of the original trial.”

A jury is supposed to hear the truth and the *whole* truth. They were not afforded this opportunity when the newly discovered evidence herein considered was suppressed at the time of trial. This suppression of that vital and material evidence deprived the jury of hearing the *whole* truth and is equivalent to falsification. At the very least, it constitutes that type of mistake within the rule of *Martin v. United States, supra*, and *United States v. Miller, supra*.

The penalty this appellant was adjudged to suffer was heavy; the issue here presented is grave. The issue is whether or not appellant possessed the necessary intent

which is the gravamen of the crime of bribery charged. The answer to that question hinged on the truth of the testimony of two men as to conversations had solely between themselves, appellant and the Government's chief witness, Hubert Tomsone. As Tomsone testified that no one but himself and appellant were present when these conversations were had, the only way appellant could refute that testimony at the trial was by his own denial, which he specifically and categorically did. [Tr. pp. 237, 238, 240, 251, 252, 257, 258.]

As pointed out in the Statement of the Case, the difference in the established character of these two men is striking. Appellant, Dr. Gage, is an orthopedic physician and surgeon, having been engaged in the practice of medicine for nearly twenty years, and was honorably discharged from the armed forces of the United States after four years of service at home and overseas in the medical corps, assigned to orthopedic surgery. [Tr. p. 201.] His reputation for truth, honesty and integrity was testified to be very good by three witnesses at the trial. [Tr. pp. 196, 197, 198, 199.] His professional reputation as a very capable and sincere orthopedic surgeon was and is very high amongst those with whom he had professional contact.

Dr. Charles E. Strachan, one of the doctors who worked with the appellant in the Orthopedic Department, testified at the trial:

“Q. And from your observation of his examinations and diagnosis of the condition of patients there, did you have occasion to observe his conclusions and recommendations with respect to patients? A. Yes, sir, I did.

Q. And from your observation in that respect, Doctor, do you have an opinion as to whether or not his diagnosis and recommendation in so far as the patients were concerned was honest and sincere? A. I believe so, yes." (*Tr. p. 283*)

Dr. Theodore Kane, in one of the transcribed telephone conversations with Joseph J. Cummins, heretofore referred to, stated:

"Dr. K. He practiced good orthopaedics. We really felt that he was a competent orthopaedic man—so that if any problems that come up from an orthopaedist's viewpoint (not readable) sort of overlooked the little points of technicalities, whether the man was entitled to it or not. If we said, 'We have a case here Gage and we'd like you to do something' he'd go ahead and do it. He didn't ask if he was eligible for it or not." (*Tr. p. 24*)

In a similar transcribed telephone conversation with Joseph J. Cummins, Dr. Charles E. Strachan stated:

"Dr. S. He treated me fine. I have no complaints against him at all and I think he was trying to do a job out there.

JJC. He is a damned good orthopaedist, isn't he?

Dr. S. Yes, he is pretty good." (*Tr. p. 30*)

There is not a scintilla of evidence in the record challenging appellant's high professional reputation and ability as an orthopedic physician and surgeon.

Contrasted with this is the testimony of three witnesses at the trial that Tomsone's reputation for truth, honesty and integrity was very bad, and that they would not believe Tomsone under oath. [Tr. pp. 298, 302, 309.]

The two character witnesses called on behalf of said Tomsone testified that his reputation was good. Each admitted that that testimony was based upon the statement of only one person. [Tr. pp. 331, 336, 337.]

As further pointed out in the Statement of the Case, Tomsone's testimony as to said conversations between himself and appellant is inherently improbable and is inconsistent with admitted conduct of the appellant. Although the testimony of Tomsone as to alleged statements of criminal intent made by appellant in said conversations is sharply in conflict, the following significant evidence stands completely uncontradicted:

(1) When appellant first applied for his position at said Veterans' Administration, he was preparing himself for admission before the State Board of Medical Examiners for the State of California, and he accepted the position at the Veterans' Administration only as an interim position until he passed said examination, at which time he intended to go into private practice, which understanding was had with Dr. Long (chief of the out-patient department at Sawtelle.) [Tr. p. 204.]

(2) According to Tomsone's own testimony, when appellant entered upon his duties at the Veterans' Administration in the early part of August, 1946, Tomsone was away on a vacation [Tr. pp. 137-138], and admittedly did not return to the city of Los Angeles and/or did not meet appellant until the Friday after Labor Day, which was September 6th, 1946 [Tr. p. 137-38], one month after appellant became connected with said Veterans' Administration.

Prior to Tomsone's return from his vacation, appellant had discovered that Tomsone's work was defective was

not in accordance with the contract specifications [Tr. p. 235] and that there were numerous complaints of Tomson's delivered products by veterans by virtue of improper fits and modifications [Tr. p. 232]. Appellant had informed Tomson of the aforesaid facts at their first meeting, to-wit, on September 6th, 1947, which latter complaint resulted in an open brawl between the appellant and said Tomson, which brawl is admitted by Tomson himself. [Tr. p. 138.] Yet the testimony of said Tomson himself is that appellant commenced his solicitation for a bribe on the 10th of September, 1946, the second time he had ever seen appellant [Tr. p. 139], and only four days after the bitter argument between them on their first meeting, which was expressly admitted by Tomson. [Tr. p. 138.]

(3) When appellant was employed by said Veterans' Administration, he was the only doctor in the orthopedic department. However, after he had worked there alone for some time, he asked for and was assigned two other doctors in his department to assist him, each of whom had the same authority as appellant to independently examine and prescribe shoes and orthopaedic devices under said Tomson contract. Dr. Frank L. Long, Chief Medical Officer of the Medical Department, and Chief of the Out-Patient Department of the hospital [Tr. p. 108], a Government witness, unequivocally corroborated this testimony [Tr. p. 121].

(4) Prior to October 2, 1946, appellant in sheer disgust with the quality and nature of Tomson's shoes and orthopaedic devices intended to resign, and that on or about October 2, 1946, he did prepare a written resignation, signed by Arthur J. Nie, Medical Administrative

Officer of the Medical Division of the Los Angeles Veterans' Administration, Regional Office, which document is in evidence as Defendant's Exhibit A [Tr. pp. 321-322]. The testimony of appellant's intention to resign was further corroborated by said Arthur J. Nie [Tr. p. 321].

It is submitted that the fact of appellant's acceptance of his position at the Veterans' Administration as an interim position is inconsistent with the idea of engaging in a course of conduct to obtain a bribe which would rest upon a continuous increase in the sale of Tomsone's shoes. It is inconceivable and inherently improbable that appellant would take the risk of commencing the solicitation of a bribe from a complete stranger whom he had met just once before upon an occasion which terminated in a bitter argument. Further, if Tomsone's testimony to the effect that appellant sought and accepted a bribe from him upon the promise that he would increase the sale of Tomsone's shoes by virtue of his authority to prescribe the same is true, why would appellant ask for and accept additional doctors in his department with the same independent authority to prescribe such shoes since this would render him incapable of performing the very promise which, according to Tomsone's testimony, was the basis of the alleged bribe. Finally, how could appellant have the intent to accept a weekly bribe from Tomsone in return for prescribing additional orthopedic shoes and devices and at the same time have the intent to resign from the Veterans' Administration?

The only testimony of the FBI agents was as to physical facts, admitted by appellant, to-wit, that he took \$100 from Tomsone in the parking lot of the Veterans' Ad-

ministration at Sawtelle, and that immediately thereafter he went directly to his office and was there apprehended by agents of the FBI, at which time the money was in his possession. However, the uncontradicted testimony established the fact that after the appellant received the money from Tomsone the appellant was in his office only a couple of minutes before said FBI agents entered and arrested him [Tr. p. 257]. As to this, appellant testified, consistent with his defense, that he was investigating and trying to entrap Tomsone, that he intended to go to Dr. Long (the chief of the department) and tell him the entire story [Tr. p. 257], but that he was prevented from doing this because of his arrest immediately after entering his office. Had said FBI agents waited a reasonable time, appellant's intent might have been clearly established and there might never have been a trial in this case.

The language of *Pettine v. Terr. of New Mexico, supra*, is peculiarly applicable to the case at bar. In that case appellant Pettine was charged with murder in the first degree. His defense was justifiable homicide by virtue of self-defense. The trial resulted in a conviction of murder in the second degree after verdict by jury. One Campagnoli, a government witness, testified that before the killing appellant was in his shop and told him he was going to kill the deceased Berardinelli. After the trial appellant moved for a new trial on the ground of newly discovered evidence, to-wit, that Campagnoli had admitted the falsity of his testimony at the trial, and that appellant had not made such a statement to him. The motion was denied and an appeal taken. The court, on pages 492-493 of the opinion stated:

"The main issue at the close of the trial of this case was whether the killing of Berardinelli was mur-

der or justifiable homicide. The answer to that question hinged on the truth of Pettine's testimony. * * * The fact that the jury failed to find that Pettine was guilty of murder in the first degree, as charged, is a demonstration that the issue on the truth of his testimony was a doubtful one. He was entitled to an acquittal unless the evidence proved him guilty of some degree of murder beyond a reasonable doubt. Who can say that this testimony of Campagnoli directly impeaching Pettine and contradicting his testimony on the great issue of the trial, his personal intention, was not the very evidence which removed the reasonable doubt that at the second encounter he was the assailed and was not the assailant was true, and prevented his acquittal. The legal presumption is that the false testimony was prejudicial, and it is far from clear beyond reasonable doubt that it was not crucial evidence without which Pettine's evidence would have been believed, the killing would have been found to be justifiable homicide, and he would have been acquitted."

Similar evidence to that obtained after trial in the case at bar and submitted to the trial court upon the motion for a new trial, constrained the Court in *People v. Skaggs*, *supra*, at page 108, to say:

"Appellant's defense was a vital issue in the case. The proven unmoral reputation of Petillo, his animosity toward police officers, the long and honorable record of appellant as a police officer and his conduct prior to his acceptance of the money, all impress us with the necessity for scrutinizing the instructions given to the jury to ascertain whether those now challenged by appellant operated to prejudice his substantial rights and militated against his receiving

that fair and impartial trial guaranteed by law to every person accused of crime.”

In the case at bar this evidence was not even in the possession of the jury. Who can say that said evidence, directly contradictng Tomsons's testimony and making it completely unacceptable, was not the very evidence which would have shifted the delicate balance of reasonable doubt to the favor of appellant.

“Trials are conducted, under the direction of the Court, in a search for the truth. A motion for a new trial, which is peculiarly addressed to the discretion of the court, should be granted, where it appears that such an important fact as was here involved was not known to the jury.”

United States v. Miller, 61 Fed. Supp. 919, 925.

It is respectfully submitted that the denial of a new trial by the trial court under the circumstances of the case at bar was an abuse of the trial court's discretion. Unless all the aforesaid vital and crucial evidence is placed before the jury so that they may have the truth, and the *whole* truth, substantial injustice will result in this case.

B. THE RECORDS OF TWO CONVICTIONS FOR THEFT OF THE GOVERNMENT'S CHIEF WITNESS, HUBERT TOMSONE, AND HIS SERVICE OF TWO SENTENCES THEREFOR.

Subsequent to the trial herein, appellant's new counsel also discovered the records of two convictions for theft of the Government's chief witness, Hubert Tomsons, and his service of two sentences therefor in the Long Beach City Jail [Tr. p. 18].

This evidence was also submitted to the trial court on the motion for a new trial, which was denied. In view of the fact that the entire case depended on the conflicting testimony of appellant and said Tomsone, this evidence was vital. Its importance is enhanced when considered in connection with the newly discovered evidence considered in Part A hereof.

The record of such convictions is admissible evidence.

Williams v. United States, 3 F. (2d) 129.

II.

The Trial Court Erred in Striking the Testimony of Fred Skill and in Preventing Him From Completing His Testimony.

Fred Skill testified that he knew Hubert Tomsone, the Government's chief witness, was acquainted with his reputation for truth, honesty and integrity, and on the basis of such reputation would not believe Tomsone under oath [Tr. pp. 297-298].

Fred Skill further testified that when he met Tomsone he liked him and had him in his house and treated him as his son "until he proved what a rat he was." Skill further testified that he had him arrested and as a result of said arrest Tomsone served twenty days in jail. This witness commenced to testify as to said arrest to the effect that he had caught Tomsone in the commission of a crime [Tr. pp. 298-299], when the Court interrupted him and upon *the Court's own motion* ordered his entire

testimony stricken and instructed the jury to disregard it on the ground that it was too remote [Tr. p. 299].

It has been repeatedly held that because character is a more or less permanent quality, inferences from it forward or backward in point of time may be made.

Professor Wigmore, in his work on Evidence (1940, Sec. 923, p. 450), states:

“* * * while character for truth only was taken as the fundamental requirement, the estimate was allowed to be based on the witness' knowledge of the other's *general* character (emphasis added); so that the inquiry in form became a compromise * * *, *i. e.*, 'Knowing his general character, would you believe him on oath?' In England, then, and in those States which allow that form of question [including federal jurisdictions], a slight concession is made * * * by allowing the witness, in giving his personal opinion as to veracity, to consider *in his own mind* the other's general qualities.” (Emphasis the author's.)

“Because character is a more or less permanent quality we may make inferences from it either forward or backward in point of time.”

Wigmore on Evidence, sec. 1618.

The following cases recognize this accepted principle:

Kennedy v. Modern Woodmen, 243 Ill. 560, 90 N. E. 1084 (Character ten years before the trial in another town, admitted);

Craft v. Barron, 121 Ky. 129, 88 S. W. 1099 (Character in Kentucky ten years before, and in California at the time of trial, admitted in the court's discretion);

State v. Albanes, 109 Me. 199, 83 Atl. 548 (Accused's character in town of residence for the ten years preceding the homicide, admitted);

Morss v. Palmer, 15 Pa. St. 51, 56 (Character more than ten years before in another county, admitted in rebuttal).

Cases to this effect can be multiplied at great length.

Certainly, there is no question that the current character of Tomsone is admissible to show present reputation, and the Court rightly admitted the testimony of the two veterans to the effect that they would not believe Tomsone on oath. Thus, the testimony of Fred Skill, which was excluded, taken together with the testimony of the two war veterans whose testimony was admitted, is conclusive that the witness, Hubert Tomsone, hadn't changed his character in the past twelve years, *i. e.*, that he still could not be believed on oath; and thus it was prejudicial error for the Court to have granted the motion to strike the testimony of Skill. And since Tomsone was the chief government witness, without whose testimony the defendant could not have been convicted, the jury were entitled to have before them the character and reputation for truth and veracity of the government's chief witness twelve years ago, as well as at the time of trial.

III.

The Evidence Is Insufficient to Sustain the Verdict and Judgment.

The evidence in the case at bar has already been reviewed and analyzed in the Statement of the Case and in Part I of the Argument in this brief, and it would serve no useful purpose to burden the Court with a repetition thereof at this point.

Appellant respectfully submits that the evidence as actually submitted to the jury, even disregarding the newly discovered evidence which the jury had no opportunity to hear, was insufficient to sustain the verdict and judgment.

The only direct evidence in the case that appellant had the necessary intent rests upon the word of Hubert Tomsone. The proven bad reputation of Tomsone and the inherent improbability of his testimony as to said conversations has heretofore been considered in an earlier portion of this brief. Because of this, there actually is no evidence in the case of intent upon which the verdict and judgment can be sustained.

Conclusion.

By virtue of the foregoing, it is respectfully submitted that the judgment in the within case be reversed and that the same be remanded for a new trial.

Respectfully submitted,

JOSEPH J. CUMMINS,

Attorney for Appellant.

No. 11532

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

APPELLEE'S BRIEF.

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No. 11532

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

APPELLEE'S BRIEF.

Statement of Facts.

Appellee submits the following statement of facts:

The trial occurred during December of 1946. The appellant, Dr. Gage, commenced working on or about August 2, 1946, in the Los Angeles Regional Office of the Veterans Administration located at Sawtelle. His duties were in the Orthopedic field. The evidence fully establishes that a part of his duties consisted of prescribing orthopedic or corrective footwear for veterans. This fact is also conceded in the argument of his attorney at time of trial [R. 349].

Hubert Tomsone, operating as Hubert's Orthopedic Service, had a contract with the Veterans Administration to furnish specialized shoes, braces, and kindred articles of an orthopedic nature, the last contract having been

awarded June 21, 1946. Hubert Tomsone had had previous contracts with the Veterans Administration [R. 85]. This last contract became effective July 1, 1946, terminating June 30, 1947 [R. 89].

Gordon L. Howe, Supply Officer of the Regional Office of the Veterans Administration, stated Dr. Gage, had told him that the contract was not a proper orthopedic contract [R. 95]. Mr. Howe stated he had received no complaints from any of the veterans in so far as shoes were concerned that were provided by Tomsone [R. 96]. The witness Howe explained that invitations for bids had been submitted and that only two bids had been received for this contract, and that the contract had been awarded to Hubert Tomsone [R. 96, R. 102]. Portions of the contract were read, pertaining to the right of the Veterans Administration to declare the contract in default for failure to perform its terms and other provisions protecting the Veterans Administration [R. 102-103].

Dr. Frank L. Long, physician with the Veterans Administration and Chief Medical Officer of the Out-patient Department, was Dr. Gage's superior [R. 108]. Dr. Long testified generally concerning Dr. Gage's duties [R. 109-110].

Dr. Long stated that either during the latter part of September or the early part of October, 1946, Mr. Tomsone called to his attention a conversation he, Tomsone, had had with Dr. Gage [R. 114]. Dr. Long related that he did not hire Dr. Gage but that he had been sent to their office by the Personnel, or some other Department of the Veterans Administration, and that he had placed Dr. Gage to work in the field where he thought he was best fitted, namely, the orthopedic field.

Dr. Long stated that Dr. Gage had advised him that he thought the veterans should have a choice of more than one contractor for shoes and orthopedic devices, but that he had explained to Dr. Gage that they had only been given one contract, and that that was all they had to work with [R. 127].

Hubert Tomsone stated that he had been in orthopedic work since 1928 [R. 133]. Tomsone stated he made it a habit to call at the Veterans Administration in Sawtelle at 2:00 o'clock every Tuesday and Friday afternoon, at which time, if the Doctor so directed, he took casts of the feet of the veterans and endeavored to follow the prescription; that he made no such devices or shoes without a prescription [R. 136].

Tomsone stated that after returning from his vacation, the day after Labor Day of 1946, was the first time he met Dr. Gage and started to work on orders for orthopedic devices prescribed by Dr. Gage [R. 136-137].

Witness Tomsone conceded that he had had some complaints on work that he had done but in each instance had endeavored to correct them [R. 137].

That the following Friday of the same week, namely, the week of Labor Day, September 1946, was an occasion when Dr. Gage inquired of Hubert Tomsone, how business was. This took place in Dr. Gage's office at the Veterans Administration [R. 137-138]. That they had a conversation with regard to business, which ended in some strained feelings [R. 138].

The next time he, Tomsone, had a conversation with Dr. Gage was the following Tuesday; this took place in

the hallway, in front of Dr. Gage's office. Dr. Gage stated to him, in substance, as follows:

[R. 139]:

A. He said to me, "Hubert," he says, "I am sorry that I talked to you like that last Friday but I like you. I want to talk to you about something very important."

And I said, "What is it all about?"

He said to me, "You know, I have been rejected by the Board of the Medical Association here in Los Angeles twice." He says, "Furthermore," he says, "I am only making \$6,000 a year and after all, I am not here for my health. I got to make money somehow."

And I said to him, I said, "This is one part that I don't want to have nothing to do."

So he says to me, "Well, you think it over and I will see you later."

Later, on that same Friday, Tomsone again talked to Dr. Gage, and Dr. Gage stated to him, in substance, the following:

[R. 140-141]:

A. He says to me that he would like to talk to me about this proposition that he was not out there for his health. He said he had to make some money somehow because he had to have money to pay off some of those persons who might help him to get a license for the State of California.

Q. Did he say anything to you about orders for you? [85] A. He said if I would play ball with him that he could make me have a lot more business than what I had now because he knew that the orders I have been getting at the present when he

was there wasn't enough for me to take care of my contract, but I told him that I had enough work to take care of veterans and also my own customers for a long time, so if it slacked up a little bit I didn't mind. That is the reason why I went on my vacation.

Q. Well, during that conversation was there any conversation about him seeing you again at the hospital or any place? A. The following—I don't recall if it was on Tuesday or Friday, but I saw Dr. Gage again at his office to get prescriptions and he says to me, "Hubert, you are selfish. There are a lot of people who make money on the outside and also a lot of physicians who get so much money as a monthly—as a monthly present sent him from other doctors, and I told him that I didn't want anything to do with it. He says to me, "Here is my address. I want you to come over."

That Dr. Gage suggested he, Tomsone, come down to Dr. Gage's apartment and talk this matter over—"for us to make some money on the side so that he would be in Sawtelle to prescribe shoes and he wanted me to give up my contract so that he could reopen a new bid under an assumed name as a professional shoe service instead of orthopedic service, and he told me he would like to have me as a silent partner. I would be doing all the work in the shop and he will prescribe all the work on the inside so that we could make a lot of money." [R. 141-142.] That at this time Dr. Gage handed him a small piece of paper which was in Dr. Gage's handwriting, which consisted of Dr. Gage's home address. This document was received as Government's Exhibit 6 [R. 142].

Witness Tomsone stated that he reported this matter to Dr. Long and also to a Mr. Duncan [R. 143]. Mr.

Duncan was the Assistant to the Manager of the Center [R. 183].

At a later date, Tomsone had a telephonic conversation with Dr. Gage, in which Tomsone stated that he could not meet Dr. Gage at his home, whereupon, Dr. Gage suggested to Tomsone "come out today" but not to meet him in front of the hospital, but to meet him at "Wilshire and Sawtelle Boulevards" [R. 143-144]. Tomsone stated he advised Mr. Duncan that he was going to meet Dr. Gage [R. 145].

About 12:15 of that day, Tomsone met Dr. Gage at the appointed place, and after some discussion Dr. Gage suggested that they go to the Mayfair Restaurant in Santa Monica [R. 144]. Witness Tomsone stated that he had advised Mr. Duncan, Assistant Manager of the Veterans Outpatient Department, that he was going to meet Dr. Gage [R. 145]. That he and Dr. Gage went to the Mayfair Restaurant and had lunch, and had an additional conversation. The conversation was as follows:

[R. 147]:

The Witness: Dr. Gage told me that he would like to have out of this contract a hundred dollars, and I told him, I said, "A hundred dollars a month?"

He said, "Hell, no \$100 a week." I say, "Gosh, I don't want to get into this."

He said, "Well, I can show you that there are many doctors who get complimentary each month as eye doctors or any other physician so that the appreciation has been given to them for the customers that they send you through the time."

And I told him, I said, "I don't know. I sure don't like to get into any mess like that because I don't want any part of it."

He said, "You are not getting into any mess like that. You see, I know what is going on in Washington." And he says to me that for him he was going to resign on the 15th day of the month, and in the meantime he thought if I would pay him the \$100 a week that he might not resign.

During the lunch at the Mayfair, witness Tomsone stated he saw Mr. Duncan, who was also in the restaurant [R. 145]. Mr. Duncan also testified that he had witnessed the meeting of Mr. Tomsone and Dr. Gage at the Mayfair Restaurant; that he had followed the car to the restaurant and had seen Mr. Tomsone and Dr. Gage have lunch [R. 184].

Tomsone stated that as he and Dr. Gage were driving back from lunch, Dr. Gage stated: "From now on you will see the difference in orders in shoes, starting today." [R. 148.] Tomsone stated that he told Dr. Gage that he would tell him whether he would, or would not, pay him the \$100; but that he couldn't make up his mind whether he would or not [R. 148].

The luncheon at Santa Monica was about October 3, 1946 [R. 149, 184]. Tomsone stated he went back to the hospital and had a conversation with Mr. Duncan [R. 148].

The following Friday, Mr. Tomsone had another conversation with Dr. Gage, which was as follows:

[R. 149]:

A. He told me that he would wait for me to give him the \$100, and I told him that I couldn't afford to pay him, and he said, "Well, I have to make more money because I just come back from downtown and they refused me to give me my license to practice in the State of California."

I told him that if he needed the money I was advised to pay him by check. So I throw my checkbook on top of the table.

Q. Speak up. A. I put my checkbook on top of his table there, on his desk, and I told him "Here, write yourself a check," and he says to me, "No, I don't want any check. This is strictly cash." [96]

Well, I told him that I didn't have no cash, and he told me that he would collect from me the next time he see me.

On or about Friday, October 18, Tomsone had another conversation with Dr. Gage at the Facility. This took place in the afternoon. Among other things, witness Tomsone testified that the following occurred:

[R. 152]:

A. He (Dr. Gage) says to me if I have the hundred dollars.

Q. What did you say? A. I say yes, sir.

Q. What else was said? A. And I told him if he wants the money there now. He says to me, "Not here." He says to me, "Let's go down to the canteen to have a cup of coffee."

We went down to the canteen and I told him, "Do you want your money here?"

He said, "Not here." He say, "We will go outside."

As we were going outside—

Q. Who is we? A. Dr. Gage and I. As we walked out there on the parking lot, he made me go near his car.

Q. Just state where you went to. A. To the parking lot where his car was parked.

Q. All right. A. It is in the parking lot of the Veterans Administration.

He say, "You can give it to me now." [100]

Witness Tomsone further stated that while on the parking lot he took the money out of his pocketbook and gave Dr. Gage \$100 [R. 153]. The witness then identified Government's Exhibit 7, which was a small slip of paper and which he stated was in his (Tomsone's) wife's writing, but that he had checked it with the money he gave to Dr. Gage and that it contained the serial numbers of the money which he had in his pocket and which \$100 he handed to Dr. Gage [R. 153-154]. The witness then stated that Dr. Gage took this money, the \$100, and put it in his lefthand pants pocket [R. 155]. After this incident they both walked back to Dr. Gage's office at the Veterans Administration, shortly after which he (Tomsone) left Dr. Gage's office.

Charles M. Duncan stated that he was employed as Assistant to the Manager of the Veterans Administration, and that October 1, 1946 was the first time he had talked with Mr. Hubert Tomsone with respect to matters Tomsone reported that were transpiring between him and Dr. Gage [R. 183]. Duncan stated it was part of his duties to conduct investigations in connection with the personnel [R. 184].

Duncan testified that on October 3, 1946, at the corner of Wilshire and Sawtelle Boulevards, he saw Mr. Tomsone meet Dr. Gage; Duncan then followed their car to the Mayfair Restaurant in Santa Monica, where he saw Tomsone and Dr. Gage partake of lunch. That he did not hear any conversation that ensued between them [R. 184].

Howard H. Davis stated he was an agent of the Federal Bureau of Investigation, and that on or about October 1, 1946, he was assigned to a matter in connection with the investigation of one Dr. Gage and one Mr. Tomsone, and worked in conjunction with Mr. Duncan [R. 185].

Witness Davis stated that on October 18, 1946 (the date 1945 as noted in the transcript is an apparent error; it should have read "1946"), he observed Tomsone and Dr. Gage leave the building where Dr. Gage's offices were located. This took place about 3:00 o'clock in the afternoon. That Dr. Gage and Mr. Tomsone both went to the canteen and were there about ten minutes, and then proceeded through the corridors to the outside of the building and to an auto park in the rear of the building [R. 186].

Witness Davis stated that he saw Dr. Gage and Mr. Tomsone remaining in the park for several minutes; he then observed them returning from the auto park and noticed that Dr. Gage was folding something between the fingers of both of his hands [R. 186].

Agent Davis stated that before this incident he had made a list of an aggregate of one hundred dollars of United States money, which money had been in the possession of Mr. Tomsone; that he had placed the serial numbers of the money on this list [Government's Exhibit 8] [R. 186-187], and that this list reflected the serial numbers of Government's Exhibit 7 (Exhibit 7 being the money consisting in all of one hundred dollars), after which he, witness Davis, had given this money back to Mr. Tomsone [R. 187].

Agent Davis stated that after he had seen Mr. Tomsone and Dr. Gage return from the auto park to the buildings, he and others had waited a short period of time; that upon

receiving a signal from Mr. Tomsone, he and other agents entered Dr. Gage's office [R. 188]. That upon entering Dr. Gage's office, the following took place:

[R. 189]:

The Witness: We requested him to stand up. That is, I requested him to stand up and told him we were going to search him as we understood he had received some money. He stated as we started to search him, "It is in my left pocket." and started to reach for it and we told him not to do it, that we would take it out. Special Agent Malloy took it out of his pocket and handed it to me. About that time the doctor made the statement, "I expected this; I knew this would happen."

Witness Davis stated that on a previous occasion, namely, October 15, 1946, in conjunction with Mr. Duncan of the Veterans Administration, he had heard—through a listening device—conversations that had taken place in Dr. Gage's office [R. 189]. The witness related that one of such conversations with reference to money was as follows:

Mr. Tomsone stated—"I couldn't bring the money with me this time."—or words to that effect; and another voice—the voice of Dr. Gage—had stated—"That is all right, don't worry about it." That there were other conversations which were inaudible or appeared to be whispering, after which Dr. Gage said—"Friday, uptown." Tomsone replied—"Friday?" which appeared to be in a questioning voice, and he then heard Dr. Gage say—"I had just as soon do business with you." [R. 189-190.]

Agent Malloy also stated that he had initialled Government's Exhibit 9, a list of 20's, 10's, 5's dollar bills and

their serial numbers. Agent Malloy stated he had removed the \$100 in bills from Dr. Gage's pocket at the time of the arrest of Dr. Gage on October 18; that he had checked the serial numbers of the money so found, with the numbers reflected on Government's Exhibit 9, and that they checked [R. 194].

Dr. Gage offered certain character witnesses and likewise took the stand. Dr. Gage gave certain testimony with respect to complaints received, concerning Mr. Tomsone's work. Dr. Gage categorically denied several of the conversations which Tomsone stated he had had with him.

Dr. Gage stated that he had complained to Dr. Long, and other doctors, with respect to the manner in which Mr. Tomsone was handling the contract [R. 238]. Dr. Gage stated that the reason he had given Mr. Tomsone his address [Government's Exhibit 6] was because Tomsone had talked to him about a good spaghetti dinner, and so that Tomsone would know where he lived, he had given him this slip of paper [R. 240]. Dr. Gage stated that he had been down to Mr. Tomsone's place of business on two occasions, sometime between the 10th and 15th of September, and that Mrs. Gage had been with him, and that it had to do with making corrective shoes for Mrs. Gage [R. 242].

Dr. Gage stated that he had made complaints to Dr. Long and Mr. Chapman (Mr. Chapman being the Manager of the Veterans Administration), with regard to an incident pertaining to Mr. Tomsone coming into his office, stating that he wanted to give Dr. Gage some money and throwing his checkbook down on the desk; that he so talked to Mr. Chapman about the 5th of October [R. 246-247].

Dr. Long later testified that at no time had Dr. Gage reported to him that Mr. Tomsone's work was inferior or of a poor quality, and that at no time did Dr. Gage tell him that Mr. Tomsone was making approaches that he, Dr. Gage, thought were irregular, nor did he ever hear Dr. Gage report to him that Tomsone had offered to allow him, Dr. Gage, make out a check [R. 324]. Dr. Long stated he had no discussion with Dr. Gage with respect to the offer of a check by Tomsone, or of money [R. 324-325].

Mr. Chapman stated that he had had conversations with Dr. Gage in regard to certain contracts and pertaining to Dr. Gage's possible resignation, but at no time did he remember Dr. Gage ever mentioning an incident with reference to Mr. Tomsone and his checkbook. Mr. Chapman stated Dr. Gage had never made any complaint as to the quality or the character of the work being done by Mr. Tomsone [R. 317].

Dr. Gage stated that he had been advised that Mr. Chapman, the Manager, had an open-door policy; that one of the doctors had suggested that he go over and talk with him and air his complaints [R. 249]. Dr. Gage stated that the purpose he had of going out to the auto park with Tomsone was to get some notes that he had in the front seat of his car [R. 255]. Dr. Gage conceded that he took a roll of bills from Mr. Tomsone while there in the auto park, put them in his lefthand pocket and walked back from the car to his office, but that he did not count this money [R. 256]. Dr. Gage stated that his intention was, when receiving this money from Mr. Tomsone, to go to Dr. Long and put it on his desk and say—"Now hear the whole story." [R. 257.]

Dr. Gage then gave categorical denials of any criminal intent on his part in either receiving or asking for this money from Mr. Tomsone.

Dr. Gage stated that prior to the time of giving his address to Mr. Tomsone on a little slip of paper [Government's Exhibit 6], he had noted that Mr. Tomsone's work was defective and inferior and had complained about this to Dr. Long and other of his associates, and that he, Dr. Gage, had not felt Mr. Tomsone was giving the Government a square deal; or, in other words, that Mr. Tomsone was cheating the Government [R. 262]. Dr. Gage conceded that after observing these unfavorable factors about Mr. Tomsone, that he saw nothing wrong in considering going out for a spaghetti dinner with Mr. Tomsone [R. 263].

Dr. Gage conceded that he had read the contract existing with Mr. Tomsone and the Veterans Administration, and was familiar with the clauses in it to the effect that unless Mr. Tomsone's work met the requirements and specifications and passed inspection, that he, Mr. Tomsone, would not be paid [R. 266]. Dr. Gage stated that as to one particular pair of shoes which cost \$43, made by Mr. Tomsone, that such price was very cheap for specially-built shoes [R. 276].

In addition to character witnesses on behalf of the defendant, the defense called certain other co-associates, or doctors employed at the Administration. Their names are as follows:

Dr. Charles E. Strachan [R. 281]

Dr. David I. Levine [R. 285]

Dr. Theodore J. Kane [R. 288]

Dr. Robert Mazet, Jr. [R. 290]

Dr. Arthur J. Nie [R. 320]

Dr. Mazet stated that he recalled Dr. Gage making a complaint about the shoes Mr. Tomsone was making [R. 291]. Dr. Mazet related that he knew all shoes built by Mr. Tomsone had to receive the approval of the Doctors, and that if they did not meet inspection, Mr. Tomsone would not be paid [R. 293].

The defense offered certain witnesses to impeach the character of Tomsone for truth and honesty. One of these was Fred Skill [R. 295]. This witness stated that Tomsone had worked for him at Long Beach, for a short while, in either 1934 or 1935 [R. 295]. Upon cross-examination and after the witness had stated Mr. Tomsone's general reputation for truth and honesty in the community in which he *has* resided was "pretty rotten," it was developed that Mr. Skill had Mr. Tomsone arrested, and that he, Skill, had never seen Tomsone since 1934, the time Mr. Tomsone left Long Beach, *nor* talked to him, *nor* heard about him, and did *not* know where he, Tomsone, presently lived; and that he had *never* heard anyone in the community where Tomsone now resides ever discuss Tomsone's character, whereupon the court struck his testimony on the ground that it was too remote [R. 299].

Two character witnesses were produced on behalf of the good character of the witness Tomsone. Their names are:

Pete Latora [R. 334], and
John Harder [R. 329]

A motion for new trial was filed. It was predicated upon the affidavit of appellant's present counsel, namely, Joseph J. Cummins. This affidavit is reflected in the records commencing R. 15. It embodies certain trans-

criptions of conversation between the affiant, Joseph J. Cummins, and several individuals.

At this point attention is invited that as to certain of the individuals, affiant Cummins conferred with, these persons also testified for the defense. The names of those who testified on behalf of the defense are the following:

Dr. Theodore J. Kane

Dr. Charles E. Strachan

Dr. David I. Levine

No showing is made as to the unavailability or why the other proposed witnesses did not appear at time of trial.

The Government submitted to the court hearing the motion for a new trial, a counter affidavit or an affidavit which has been designated as the "Affidavit of Howard H. Davis In Opposition To Motions Made By Defendant" [R. 61]. A reading of this opposing affidavit will reflect that all the salient matters covered in the affidavit of Joseph J. Cummins were called to the attention of the persons referred to as proposed witnesses in the Cummins affidavit.

The matter was submitted upon such affidavits. No request was made by the defense to have any of the proposed witnesses appear in person, and the court ruled adverse to the motion for a new trial.

ARGUMENT.

I.

The Trial Court Did Not Abuse Its Discretion in Denying the Motion for New Trial Based Upon Alleged Newly Discovered Evidence.

It is to be noted that the prime contention urged in the motion for new trial was that predicated upon the affidavit of Joseph J. Cummins, commencing R. 15. This affidavit, together with the transcription of conversations had over the telephone between affiant Cummins and six designated individuals, was the primary moving document urged in support of the motion for new trial. In the transcript, commencing R. 19 and concluding R. 60, is an account of such conversations.

Subsequent to the receipt of affiant Cummins' affidavit, the Government caused an FBI Agent to interview each and every one of the doctors, or persons, referred to in the Cummins affidavit. The Government caused to be filed, and there was before the court at the time of the hearing of the motion for new trial, the opposing affidavit of Howard H. Davis, the FBI Agent [R. 61]. This affidavit of Agent Davis may be termed a "counter-affidavit." This affidavit had attached to it as Exhibit "A," copy of a letter written by appellant, Dr. Gage, and Exhibit "B," a reply to such letter.

Before going into the details of these two affidavits and the citations of authorities, we wish to call attention to the following:

(1) No contention was urged, and no showing has been made, that any witness who testified for the defense perjured himself or wished to retract the testimony he gave.

(2) The transcriptions between affiant Cummins and the various named individuals, six in number, do not show any evidence which can properly be classified as newly discovered evidence or evidence that could not have been discovered prior to trial, and no showing is made that with due diligence such could not have been produced at time of trial.

(3) Of the six persons interviewed, namely, Drs. Kane, Strachan, Levine, Hearst, Kuhn, and Colonel Strayder, three of these individuals appeared and testified for the defense. The three who appeared at trial and testified for the defense are as follows: Dr. Charles E. Strachan [R. 281], Dr. David I. Levine [R. 285], and Dr. Theodore J. Kane [R. 288].

(4) In addition to these three doctors who did testify and against whom no restriction was placed at time of trial, no showing is made why they did not reveal all of the evidence that it is now contended they can offer. We find two other associate doctors of the Veterans Administration also testified on behalf of the defendant. Their names are: Dr. Robert Mazet, Jr. [R. 290], who worked in the same department as Dr. Gage, and who gave no such testimony as it is now sought to have established by these other witnesses; and Dr. Arthur J. Nie [R. 320], who testified for the defense.

(5) A reading of the record will clearly reflect that the defense did endeavor to establish, at time of trial, that Dr. Gage was conducting an investigation of Tomsone, and that he (Dr. Gage) took the \$100 from Tomsone as a

part of his scheme to entrap Tomson. Apparently the jury did not believe this evidence. That such was the defense at time of trial is repeated in Appellant's Opening Brief, page 4, the first paragraph.

A careful examination of the transcriptions of the Cummins affidavit will reveal that all of the wishful questions or suggestions proposed by affiant Cummins to the various persons he interviewed over the telephone, was, as stated, wishful priming to the effect that Dr. Gage had made some sort of statement that he, Dr. Gage, had made an investigation and that there would be "fur flying," or "hell popping."

A reading of the transcription reveals that the only "fur flying" that was anticipated had to do with a letter Dr. Gage had written on September 5, 1946 to Veterans Administration, with regard to a request for circular letters, etc., which letter we believe is reflected in the Davis affidavit, Exhibit "A" [R. 69], and the reply from C. W. Colebaugh, M. D., of September 25, 1946, Exhibit "B" of the same Davis affidavit [R. 70]. No effort has ever been made upon the part of Dr. Gage to produce such letters, either at trial or in his motion for a new trial, and a reading of the transcripts will reveal that most of the persons interviewed over the 'phone by affiant Cummins were of the mind that the "fur flying," "hell popping," and "fireworks," pertained to a letter Dr. Gage had written. Note the transcription of Dr. Levine, the upper portion of the page [R. 34].

We also call attention to the Davis affidavit [R. 66]:

"Dr. Hurst, did know that Dr. Gage had said that he was investigating something and a day or so later, he, Dr. Gage, had said that he had written a letter to Washington."

This explanation of “fireworks” and “fur flying,” as having referred to the letter Dr. Gage had written rather than his pretended investigation of Tomson’s actions, is further borne out from the interview of Dr. Kane [R. 64].

It is submitted that the evidence now offered, as proposed by the Cummins affidavit and the accompanying transcriptions, if of any significance, is purely cumulative evidence and since no showing has been made as to why, with due diligence, it could not have been produced at trial, the court properly exercised its discretion in denying the motion.

We shall, at a later point, specifically discuss these affidavits, but before doing so we think that it is timely to refer to a rather recent case of the Supreme Court pertaining to the law applying in a situation very similar to the instant one.

A. The Supreme Court Has Recently Reannounced the Rule That in Connection With a Motion for New Trial, Seldom Should the Appellate Court Substitute Its Judgment on the Facts for That of the Trial Judge.

United States v. Johnson, 327 U. S. 106 (1946).

In the *Johnson* case a conviction was had under the Revenue Acts pertaining to income tax. Subsequent to the conviction, persistent efforts were made to obtain a new trial. The convicted persons first filed motions to the effect that newly discovered evidence proved that one Goldstein, a Government witness, was unworthy of belief and had committed perjury. To support this charge they offered numerous affidavits. The Government filed an answer to the motion, and a number of counter-affidavits. The trial court heard the motions and concluded that none

of them showed that Goldstein had perjured himself, and denied the motions for new trial.

The case then went to the Circuit Court, and the Supreme Court—in commenting upon the correct principles applying to such a situation and as to what was (first) held by the Circuit Court, on page 109 of the *Johnson* case states as follows:

“The circuit court of appeals affirmed. 142 F. 2d 588. It unanimously held that it could not substitute its judgment on the facts for that of the trial judge; that it did not have power to try these facts *de novo*; that it could review the record for errors of law, to determine, among other things, whether the trial judge had abused his discretion; that a review of the new evidence in the record did not inevitably lead to the conclusion that Goldstein had testified falsely; that the trial judge had not reached his conclusion ‘arbitrarily, capriciously, or in the misapplication of any rule of law’ and hence had not abused his discretion.”

A second petition for certiorari was filed in the Supreme Court, and while that petition was pending a second or amended motion for a new trial was filed in the District Court. This motion was based primarily upon discrediting the Government witness Goldstein, and also on some facts that had not been discovered until shortly before the amended motion was made.

The trial court again denied the motion, considering that Goldstein had been a truthful witness.

The case again went to the Circuit Court of Appeals, and by a two to one decision the Circuit Court reviewed parts of the affidavits and concluded from them that the

trial court's finding, that Goldstein did not commit perjury, was illogical and unreasonable and held that the trial court's contrary conclusions amounted to an abuse of discretion.

The Supreme Court, in the *Johnson* Opinion, *supra*, reversed such holding by the Circuit Court, and the language of the *Johnson* case—particularly as it applies to the instant case—we believe, is quite conclusive in support of the position the Government now urges. We quote therefrom as follows:

Pp. 111-113:

“Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari.

“* * * But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren v. United States*, 217 U. S. 509; *Holt v. United States*, 218 U. S. 245; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 481. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247; *Glasser v. United States*, 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

“The trial judge's findings were supported by evidence. He had conducted the original trial and had

watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits.”

P. 113:

“While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try *de novo* motions for a new trial. It was wrong in the second instance when it did review the facts *de novo* and order the judgment set aside.”

Based upon the holdings in the *Johnson* case, which we feel to be the latest expression of the Supreme Court upon a similar matter as is now before the court, it seems to be well established that, except for most extraordinary circumstances, a motion for new trial should not be granted when such review is sought on the alleged ground that the trial court made erroneous findings of fact. It is only when the findings of fact are wholly unsupported by evidence that such a motion should be granted.

The *Johnson* case is also authority for the principle that the trial judge is, generally speaking, most qualified to pass upon the moving and counter-affidavits.

B. Discussion of Significant Remarks and Statements Reflected in the Cummins Affidavit, and in the Transcriptions Between Affiant Cummins and Six Individuals Interviewed Subsequent to Trial.

We have first called attention that three of the persons interviewed by affiant Cummins, namely, Dr. Kane, Dr. Levine, and Dr. Strachan, testified for the defense. No reason is shown why they did not then give all of the testimony of which they had any knowledge. It is submitted that even the transcriptions of the interviews had with them do not present newly discovered evidence.

We shall review certain of this proposed evidence so far as it pertained to any knowledge upon the part of each of these named proposed witnesses, to the effect that Dr. Gage had implied to them that he was investigating Tomsone for an alleged bribe being offered by Tomsone.

DR. KANE—PORTION OF CONVERSATION
BETWEEN AFFIANT CUMMINS AND DR. KANE.

[R. 20]:

Dr. K. Not to me, no. No, look all that came up in the trial. The only thing that Levine, Kuhn and myself could testify to—and I think the testimony bears us out—was the fact that he went ahead and he *did* complain that the quality of Tomsone's work was not satisfactory * * *.

JJC. Well was there any conversation around there about the word "bribery," doctor?

Dr. K. No.

JJC. And not to your knowledge—

[R. 26]:

JJC. But to the best of your knowledge he never came to you and complained that Tomsone was trying to bribe him.

Dr. K. No, all he did was complain about the quality of his work. He did complain plenty about his work, that it was no good.

Dr. Kane was also inquired of by affiant Cummins, with respect to a conversation he overheard Dr. Gage make, inferring that he, Dr. Gage, was conducting an investigation. We quote, in part, the question and Dr. Kane's reply:

[R. 57]:

JJC. * * * That one of these days there'll be "hell popping," or "fur flying," or words to that effect. Were you present when such a statement was made?

Dr. K. I don't recall. He, of course, kept bitching all the time about the quality of the work. That was the most of his complaint.

Dr. Kane was then again inquired of with regard to this matter of "hell popping," by affiant Cummins, to which he replied as follows:

[R. 59]:

Dr. K. Not as such. My impression is that any time I heard him make anything—might imply anything like that—was when he was trying to get this letter.

Again, on R. 60, we see that the impression of Dr. Kane, with regard to "some hell to pay," was with reference to a letter that Dr. Gage was waiting for, in regard to the contracts.

DR. STRACHAN—PORTION OF CONVERSATION
BETWEEN AFFIANT CUMMINS AND DR. STRACHAN.

[R. 27]:

JJC. Uh huh. He never mentioned to you that Tomsone was trying to bribe him?

Dr. S. No, he did not.

[R. 28]:

Dr. S. That was the weakest point in his whole case. He said that he was playing private detective, but as far as I know he confided in no one, that he was trying to trap Tomsone.

DR. LEVINE—PORTION OF CONVERSATION
BETWEEN AFFIANT CUMMINS AND DR. LEVINE.

[R. 32]:

Dr. L. Well I let him know that when he came to me originally * * * prior to the trial. [37]

JJC. Uh huh.

Dr. L. I told him I'd tell exactly what I knew and he didn't expect any more.

[R. 33]:

JJC. Did he ever, at any time, say to you that Tomsone was trying to bribe him?

Dr. L. No.

JJC. Did he ever indicate by any words that somebody was trying to give him some money?

Dr. L. Not to my knowledge, no.

[R. 36]:

JJC. Whether or not he complained to you about—or mentioned to you—that Tomsone was trying to bribe him.

Dr. L. Yes, they asked me that question and I had to answer as I told you. That I did not know about that.

[R. 39]:

JJC. * * * but if he told one or two of the boys that this fellow Tomsone is trying to bribe me—as he told me in jail—that's what happened—that's his story.

Dr. L. I can't say that he ever mentioned that to me. Or I would have admitted it on the stand.

DR. KUHN—DISCUSSION WITH REFERENCE
TO THE TRANSCRIPTION.

About all that can be said of Dr. Kuhn's remarks to affiant Cummins is that he showed a disposition to not testify; however, no showing is made why he could not have been subpoenaed, and it is noteworthy to note that affiant Cummins [R. 47] called attention that he might have to get a subpoena for Dr. Kuhn, but no subpoena was ever obtained.

DR. STRAYDER—PORTION OF CONVERSATION
BETWEEN AFFIANT CUMMINS AND DR. STRAYDER.

[R. 48]:

JJC. Did he have any talks with you regarding Tomsone, whether the—that Tomsone was trying to bribe him?

Dr. S. No, I didn't know anything about it.

Dr. Strayder does concede that it was common talk about Dr. Gage's complaints on the type of shoes Tomsone was delivering [R. 49]. However, Dr. Strayder stated [R. 49-50] that he had never heard Dr. Gage, either directly or inferentially, say anything with regard to a payoff, and further stated as follows:

[R. 51]:

JJC. Wasn't it common knowledge among the young doctors there in that department that Gage was working on some kind of an investigation? [52]

Dr. S. I couldn't tell you.

[R. 52]:

Dr. S. * * * But as far as there had ever been any bribery or anything like that, it had never been brought up—at least, not to my knowledge.

DR. HURST—DISCUSSION WITH REFERENCE
TO THE TRANSCRIPTION.

The only doctor interviewed by affiant Cummins who gave some solace to the contentions urged, was Dr. Hurst. He had heard expressions from Dr. Gage such as “fur flying,” or “hell popping,” and he had also heard Dr. Gage mention that he, Dr. Gage, was trying to get Tomsone because he, Dr. Gage, felt Tomsone was paying somebody off.

There is no showing why Dr. Hurst was not produced at trial. There is no presumption that he was unavailable.

Dr. Hurst was reinterviewed by Agent Davis, as is reflected [R. 65-66]. We submit without further comment at this point that Dr. Hurst, when so interviewed, repudiated any such statement.

C. Excerpts From the Opposing or Counter-affidavit of
Howard H. Davis, Commencing R. 61.

As heretofore indicated, and as will be revealed from a reading of the Davis affidavit, Agent Davis interviewed all of the six persons who had talked over the 'phone to affiant Cummins, and read to them portions of the Cummins affidavit that referred to statements they had made. A brief account of what each of said doctors said to affiant Davis is as follows:

DAVIS AFFIDAVIT INTERVIEWING DR. LEVINE.

[R. 62]:

Dr. Levine advised he did not recall Dr. Gage saying he suspected a payoff by Tomsone, nor that he, Dr. Gage, was investigating it. * * * Dr. Levine advised that it was not common knowledge to him, Dr. Levine, that Dr. Gage was making an investigation of a payoff by Hubert Tomsone.

DAVIS AFFIDAVIT INTERVIEWING DR. STRACHAN.

[R. 63]:

* * * He had never told one soul, to my knowledge, that Tomsone had ever bribed him in any way. He, Dr. Gage, said he wanted to get Dr. Long and Dr. Willett out of here.

DAVIS AFFIDAVIT INTERVIEWING DR. KANE.

[R. 64]:

* * * He, Dr. Kane, stated that he did not know that it was common knowledge that Dr. Gage was making an investigation of a payoff by Tomsone and he, Dr. Kane, further stated to affiant: "When you ask about Tomsone by name, I say No; circular letter, Yes."

DAVIS AFFIDAVIT INTERVIEWING DR. HURST.

[R. 65-66]:

* * * Dr. Hurst advised that the only thing Dr. Gage had said about Tomsone was that his work was inferior. He, Dr. Hurst, then stated in response to specific questions from your affiant that Dr. Gage did not specifically mention that he was investigating Tomsone; [67] that he, Dr. Gage, did not say he

was trying to get Tomsone; that he, Dr. Gage, did not say he suspected Tomsone was paying somebody off, but that his, Dr. Gage's conversation was general.

DAVIS AFFIDAVIT INTERVIEWING DR. KUHN.

[R. 66-67]:

* * * Dr. Kuhn advised your affiant that Dr. Gage had stated on several occasions that he was dissatisfied with things at the Veterans Administration but that other than that he said nothing. Dr. Kuhn stated further that Dr. Gage never mentioned any investigation of a payoff by Tomsone or graft or any sort of investigation in his presence.

DAVIS AFFIDAVIT INTERVIEWING LT. COL. STRAYDER.

[R. 68]:

* * * Dr. Gage, had never made any statement that he, Dr. Gage, thought there was a payoff going on or that he was making an investigation of any kind. Col. Strayder stated that he rather questioned that Dr. Gage had made such a statement to him, since he was sure that if it had been impressed upon him that if any bribery or such matter was going on, that he would have reported it immediately to his, Strayder's superior. * * * Col. Strayder also related that it was not common knowledge to him that Dr. Gage [69] was making any kind of an investigation at the Veterans Administration.

D. Discussion.

In view of the *Johnson* case heretofore discussed, and of additional authorities that will be submitted pertaining to the court's discretion in denying a motion for new trial, it is difficult to see where any abuse of discretion was had by the trial court.

The defendant was ably represented at time of trial. Very few points in connection with his defense were overlooked. There is no showing why each and every one of the persons referred to in the Cummins affidavit could not have been available at time of trial. Three of these doctors did testify for the defense, and two others, namely, Dr. Nie and Dr. Mazet, also of the Veterans Facility and associates of Dr. Gage, testified.

Dr. Gage's defense, that he was endeavoring to entrap Tomsone and was conducting sort of a private detective investigation of Tomsone, was a defense which he urged at trial. It apparently was not believed by the jury.

This is the usual case of endeavoring to bolster the defense by certain additional testimony somewhat of a cumulative nature, which, if pertinent, should have been produced at time of trial. This is not a case of any witness admitting that he had perjured himself, as is reflected in *Martin v. United States*, 17 F. (2d) 973, and other cases of like nature cited on page 25 of Appellant's Brief.

It should further be pointed out that the Government could not, at trial, have attacked—had it so desired—Dr. Gage's qualifications as a good orthopedic physician and surgeon. Dr. Gage was not being charged with a violation pertaining to his efficiency under a Civil Service removal investigation, hence his ability or lack of same was only remotely in issue. The Government has no quarrel with the contention that he probably is a competent physician and surgeon.

II.

Additional Discussion of Authorities With Regard to the Court's Discretion in Denying a Motion for New Trial.

The cases that will be referred to hereinunder are submitted upon principles which we feel are well established, however, citations may be of convenience to the court.

We have heretofore referred to and discussed the following rather late Supreme Court case in connection with the higher court's ruling with reference to a denial of motion for new trial. See:

United States v. Johnson, 327 U. S. 817.

The next case hereinunder cited contains these established principles:

(A) The granting of a new trial on after-discovered evidence rests in the sound discretion of the court.

(B) The denial of new trial based upon after-discovered evidence will not be disturbed on appeal in the absence of a plain abuse of discretion.

(C) An application for a new trial based upon later-discovered evidence is not regarded with favor and will be granted with great caution.

(D) Newly discovered evidence which is merely impeaching in character does not generally warrant the granting of a new trial.

(E) Newly discovered evidence is not normally a ground for new trial unless it is of such a nature that on the new trial such evidence would probably bring about an acquittal. To this effect see:

Long v. United States, (C. C. A. 10th) 139 F. (2d) 652, at p. 654.

That a motion for a new trial is addressed to the trial court's discretion, and that its ruling is not reversible unless there is a manifest abuse of discretion, has frequently been stated. To this effect see:

Bratcher v. United States, (C. C. A. 4th) 149 F. (2d) 742, at p. 747; cert. den. 325 U. S. 885.

To like effect:

Roberts v. United States, (C. C. A. 4th) 137 F. (2d) 412; cert. den. 320 U. S. 768.

The last mentioned case, the *Roberts* case, also points out that a new trial should not be granted on the ground of after-discovered evidence where there was nothing in the supporting affidavit to show discovery of any evidence that was not known to the defendant in ample time before the trial began. See page 416 of the *Roberts* Opinion.

To like effect, with respect to evidence that could have been, with due diligence, produced sooner, see:

Evans v. United States, 122 F. (2d) 461; cert. den. 314 U. S. 698 (C. C. A. 10th).

The *Evans* case also points out that the alleged newly-discovered evidence must not be merely cumulative or impeaching, but must be of such a nature that on the new trial it will probably produce an acquittal. See page 468 of the *Evans* Opinion.

We quote from pages 468-469 of the *Evans* Opinion:

"Concerning newly discovered evidence as a ground for new trial, it is said in 23 C. J. S. Criminal Law, p. 1253, §1461, as follows: 'Generally newly discovered evidence is not ground for a new trial unless it is credible and probably would change the result.'

“Johnson v. United States, 8 Cir., 32 F. 2d 127, 130 enumerates the legal grounds for sustaining a motion for new trial as the following: ‘There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. 12 Cyc. 734, and cases cited.”

To like effect:

United States v. Winter, 38 Fed. Supp. 627.

It appears to be well settled by this Circuit, and others, that a new trial should not be granted when the newly discovered evidence only tends to lessen, but not destroy, the credibility of evidence taken at the trial. See:

Kramer v. United States (C. C. A. 9th) 147 F. (2d) 202.

To similar effect:

United States v. Hefler, (C. C. A. 2d) 159 F. (2d) 831.

It has also been announced by the courts that a new trial is not warranted by affidavits of allegedly newly discovered evidence designed only to impeach a witness, where the demeanor of that witness at trial seemed to refute the affidavits. To this effect:

United States v. Reid, 49 Fed. Supp. 313; aff. 136 F. (2d) 476 (C. C. A. 5th); cert. den. 320 U. S. 775.

It is only in most unusual cases that inexperience or mistakes of counsel are grounds for new trial. To this effect:

Norman v. United States, (C. C. A. 6th) 100 F. (2d) 905; cert. den. 306 U. S. 660;

Burton v. United States, 151 F. (2d) 17 (C. C. A. D. C.).

A. There Was No Proper Evidence of the Alleged Record of Two Convictions for a Theft by Hubert Tomsone, the Government's Witness, as Is Implied in the Joseph J. Cummins Affidavit.

On page 34 of Appellant's Brief, he additionally argues that his motion for a new trial should have been granted because of the contention of two convictions for theft of the Government witness Hubert Tomsone.

It is noteworthy to point out that at no time was Hubert Tomsone inquired of, if he had ever been convicted of felony.

Mr. Tomsone was on the stand, and yet no effort was made to so impeach him. It is but reasonable to believe that appellant's counsel at trial, and his present counsel, know as a matter of fact that Hubert Tomsone has never been convicted of a felony.

The established rule with respect to how a witness may be impeached has been codified under the California law, namely, Section 2051, Code of Civil Procedure. We quote same:

"§2051. *How impeached.* A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but

not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony.”

It is not our desire to challenge the veracity of the Cummins affidavit because we believe it is made in good faith; the writer of this brief has great respect and personal fondness for Mr. Joseph J. Cummins. However, we would be amiss in our duties if we did not point out the fault of the contention now urged.

The only proposed evidence with regard to the charge that Hubert Tomsone was twice convicted of theft is that contained in Paragraph 10 [R. 18] of the Cummins affidavit. This paragraph starts out with the assertion: “Affiant is informed and believes * * *.” It should be noted that there is no statement made as to the date of the alleged convictions, or whether or not the alleged convictions were misdemeanors or felonies. All of these assertions are merely an attempt to discredit a witness in a matter not provided for by the rules of evidence and as codified in the California statute, 2051, Code of Civil Procedure.

It is elementary that a person cannot be directly impeached as to his character by an assertion that he has been convicted of a crime of a less nature than a felony.

The defense relies upon the case of *Williams v. United States*, 3 F. (2d) 129. We have read the *Williams* case and cannot agree with appellant that it is authority for the contention he now urges. In the *Williams* case, as is

reflected on pages 129 and 136 thereof, the trial court *refused* to permit the defense to ask of a Government witness if he had been convicted of a felony. The Appellate Court pointed out that this refusal was error.

This is not the same as in the instant case, for here no such question was ever asked of the witness Hubert Tomson. We quote what the court stated on page 136 of the *Williams* case, which we feel is determinative of this point:

“Our conclusion in the whole matter is that a witness may be asked on cross-examination, for the honest purpose of affecting credibility, whether he has been convicted of a felony, subject to such limitation as the sound discretion of the court may dictate to prevent abuse of the right; that the questioner is bound by the reply, unless the record of conviction is produced to refute the answer of the witness.”

We would agree with counsel had the question been asked of Tomson—if he had ever been convicted of a felony and he had stated No, and had the defense then been able to produce a record of conviction of a felony, such record would have been proper. It must be assumed that no such record exists, or appellant’s counsel at trial or his present able counsel would certainly call to the court’s attention the existence of such a record.

III.

There Was No Error in Striking the Testimony of the Impeaching Character Witness Fred Skill, Upon the Ground of Its Being Too Remote.

The testimony of the witness Fred Skill commences in the transcript [R. 295]. A slight reading of the direct examination will illustrate that there was extreme bitterness and hard feelings upon the part of Fred Skill, toward the witness Tomsone. This witness was asked the usual question as to whether he was familiar with Mr. Tomsone's general reputation for truth and honesty in the community in which he *has* resided. His reply was: "A. Pretty rotten."

It should be borne in mind that the verdict of this jury was returned in December, 1946.

The cross-examination of the witness clearly reflects not only a most marked bitterness and vindicativeness by Skill toward Tomsone, but it further established that he had *neither* seen Mr. Tomsone, *nor* heard about him, *nor* talked to him, since the year 1934, and that the last time he had known anything about Mr. Tomsone was when he knew him in Long Beach, in the year 1934.

It is thus seen that this testimony was remote; it went back *twelve* years without intervening knowledge. It was properly excluded in the court's exercise of its discretion, as being too remote.

We feel it appropriate to set forth in this brief some of the cross-examination of the witness Fred Skill [R. 299]:

By Mr. Neukom:

Q. You don't know where Mr. Tomsone went after he left Long Beach after that, do you? A. I don't know what?

Q. He left Long Beach after that, didn't he?

A. Yes. [288]

Q. And you don't know where Mr. Tomsone lived after that do you? A. No.

Q. You don't know where he lives now, do you?

A. I never inquired.

The Court: You have never seen him since 1934?

The Witness: No.

The Court: Or talked to him?

The Witness: No.

The Court: Or heard about him?

The Witness: No.

By Mr. Neukom:

Q. You haven't heard anyone in the community where he now resides ever discuss his character, have you? A. I haven't heard a thing.

Q. Nor have you heard anyone—

The Court: Just a moment. The witness' testimony is stricken and the jury is instructed to disregard it on the Court's own motion, on the ground that it is too remote.

The general rule is that unless there is a manifest abuse of discretion the trial court's ruling on excluding character impeaching testimony as being too remote, is not to be disturbed. The trial court is in a better position to evaluate, from observation and demeanor, the testimony offered.

It should be recalled that this testimony was stricken because it referred back to a period of over *twelve* years.

There are not many federal authorities on the subject but we submit the following in support of the contention that the trial court did not abuse its discretion in striking this testimony:

Teese v. Huntington, 64 U. S. 2, at p. 14.

The *Teese* case is one of the most often cited federal cases on this point, *i.e.*, authority to reject impeaching testimony if the same is remote. The testimony which was excluded in the *Teese* case pertained to the reputation *five* years prior to the trial. The trial court held this to be too remote. This holding was approved upon appeal. The case is authority for this proposition:

“* * * and as the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court.” (P. 14)

State v. Thomas, 113 P. (2d) 73 (Wash.).

In the above, *Thomas* case, the trial court excluded testimony which sought to impeach a thirteen year old prosecuting witness which concerned her bad reputation for truth a little over *two* years prior to trial, pointing out that the same was too remote. This ruling was held to not have been an abuse of discretion. It is true the court discussed the lack of maturity of such prosecuting witness. The Opinion, however, contains authority that the exclusion of such attempted impeaching testimony as being too remote is a matter largely within the court's discretion. Attention is invited to page 77 of the Opinion.

There are several California cases in like accord. We shall cite but two:

In the case of *People v. Cord*, 157 Cal. 562, 108 Pac. 511, pp. 515, 516, of the Pacific citation appears a well reasoned explanation of the rule where testimony of the general reputation which was remote is shown to be justifiably excluded. While the period in that case was twenty years, the Opinion recognizes the proper rule of law, that it is better that the witness be acquainted with the general reputation in the community at or near the time in question.

People v. Love, 29 Cal. App. 521, 157 Pac. 9.

In the above, *Love*, case the rule is announced that the expression of an opinion, that the general reputation of another witness for truth was bad, is especially committed to the trial court, and, unless shown to have been thoroughly abused, cannot be held as prejudicial error.

It is, of course, well settled that witnesses are presumed to speak the truth and that the jury are the final and exclusive judges of their credibility.

Calif. C. C. P., Sec. 1847.

We have carefully checked the authorities with respect to the discretion of the court in excluding impeaching testimony of a remote nature. In closing, we call attention to the following:

70 *Corp. Jur.*, Sec. 1041, pp. 828 through 830,
Title, Witnesses.

The foregoing authority recognizes that as a general rule, inquiry as to the reputation of a witness' credibility primarily relates to the time when he testifies, or rather close prior to that time, but that there is no definite time limit that can be arbitrarily fixed. Numerous cases are cited in the footnotes where it has been held *twelve* years, *eight* years, *four* years, *three* years, etc., were properly ruled as too remote.

The footnotes of the above authority also contain authority that in the absence of showing of continuance in, or habit of, evil doing upon the part of the witness, remote testimony is properly excluded. On page 830 of the above authority is set forth the rule pertaining to the trial court's discretion, which points out that the discretion should largely rest with the trial court.

In closing on this subject-matter, we feel that it is not inappropriate to quote from a case in this Circuit, namely:

Gibson v. United States, (C. C. A. 9th) 31 F. (2d) 19, at p. 24.

“The same considerations apply to the collateral issue raised respecting the credibility of certain of the government’s witnesses by testimony of bad reputation in point of their veracity. Unless sufficient to convince the jury that their reputation was in fact bad, the testimony on the point would avail nothing.

“Affirmed.”

The above language is only appropriate in that it illustrates that unless the attempted impeaching evidence was believed, it avails nothing.

In this connection we call attention that the defense offered the testimony of two other witnesses attempting to impeach the reputation or character of the witness Tomsone for truth and veracity. They were the following:

Allen E. Curry [R. 301], and
Carl Kancheff [R. 309]

If their testimony is read it will also be seen that they were more complainers, rather than persons who actually knew much concerning Tomsone’s general reputation. The jury, apparently, did not place much weight on their attempted impeachment testimony.

This is *not* a case where the Government witness is being inquired of, *i.e.*, if he has been convicted of a felony; or where the Government witness is being cross-examined as to his background, or other reasons in testifying for the Government with the thought of showing bias or the witness’ expectation of leniency for his cooperation with the Government.

IV.

**Further Discussion of the Evidence, Particularly
With Reference to the Corroboration of the Wit-
ness Tomsone.**

One of the primary arguments advanced by the appellant is that the testimony pertaining to the solicitation of the bribe, is that it is his word against Tomsone's. The appellant then proceeds to argue that Tomsone's testimony is so incredible that it should not be believed.

The Government concedes that the case against appellant is based largely on the testimony of the witness Tomsone. This is not unusual in a case of this character. Bribery, of necessity, is a crime of secrecy. It calls for private dealings and is generally only known to the person soliciting and the person paying. It would not be expected that it would be committed in the presence of others. Rarely is the offense of bribery provable by the testimony of third parties, except as to some corroborative circumstances.

The jury heard the defense offered by Dr. Gage, to the effect that Dr. Gage was trying to trap Tomsone. The jury must not have believed this testimony. There is nothing singular in the evidence of this case that is not also present in most cases of like character.

Attempts were made to impeach the veracity of the witness Tomsone. Evidence was offered as to the good character of Dr. Gage. This evidence was submitted to the jury.

It should not be overlooked that there was *corroboration* of the testimony of Tomsone. We call attention to some of such corroborative evidence.

Dr. Long stated that either during the latter part of September or the early part of October, 1946, Mr. Tomsone called to his attention the conversation he, Tomsone, had had with Dr. Gage [R. 114].

Mr. Duncan, Assistant Manager, stated that he talked to Mr. Tomsone with respect to matters Mr. Tomsone reported that were transpiring between Dr. Gage and Tomsone [R. 183]; that he witnessed Dr. Gage and Mr. Tomsone meeting each other on October 3, 1946, at the corner of Wilshire and Sawtelle Boulevards, and then later have lunch together at the Mayfair Cafe in Santa Monica [R. 184]. This, the witness Duncan stated, was in the performance of his official duties in the investigation he was conducting [R. 184].

Agent Davis stated he had observed Mr. Tomsone hand an object to Dr. Gage while the two of them were in the auto park the day of the arrest, namely, October 18, 1946, and before this he had made a list of the bills, \$100 in all, which were in the possession of Mr. Tomsone, placing the serial numbers on the list, after which he had given the \$100 in bills back to Mr. Tomsone [R. 186-187].

Prior to the handing of the bribe money, Agent Malloy had likewise made a list of this money and it checked with the \$100 in bills that was found in the possession of Dr. Gage at the time of his arrest [R. 193-194].

On or about October 15, 1946, Agent Davis and Mr. Duncan, the Assistant Manager, had heard, through a listening device, conversations between Mr. Tomsone and Dr. Gage, pertaining to money [R. 189-190].

It is thus seen that the evidence of Hubert Tomsone with regard to the acts of preliminary solicitation and the subsequent conversations between Dr. Gage and Mr. Tom-

sone, with regard to Dr. Gage's request for a bribe, is corroborated by some rather significant circumstances.

In this case, Mr. Tomsone, the person who was to pay the bribe, promptly went to persons in positions of authority and as a result proper plans were made so as to apprehend Dr. Gage when he accepted the bribe.

An additional illustration of how the actions of Dr. Gage adversely impressed even a friendly defense witness, is noted in the transcription accompanying the motion for a new trial.

We refer to an observation of Dr. Strachan, when interviewed by affiant Cummins.

(Dr. Strachan talking) [R. 29].

And there's another thing that kind of weakens the case [34], and that is that it was important enough for him to go downstairs to get a cup of coffee when there were a lot of patients waiting; it was important enough for him to go out to his car to get some papers that he was working on, while there were patients waiting, but after he had the money in his pocket, there were a lot of patients waiting in the hall and they were more important than getting rid of the guilt—getting rid of the money * * * and that is a hard thing to beat.

We feel that there is considerable weight in the above-quoted observation of Dr. Strachan. Dr. Strachan's observation is most logical. The jury probably reasoned likewise.

If Dr. Gage's intent was that of an innocent person it is hard to see why he would go out to the parking lot with

V.

Brief Discussion of a Few Federal Bribery Cases.

We shall cite a few cases pertaining to affirmations of convictions for soliciting or accepting a bribe. They are the following:

Whitney v. United States, (C. C. A. 10th) 99 F. (2d) 327.

The above case points out, among other things, that it is no defense that the employee of the Government did only what he was legally bound to do.

Fall v. United States, 49 F. (2d) 506; cert. den. 283 U. S. 867.

This case points out that the gist of the offense is the acceptance of a bribe to influence official conduct, or that the crime of bribery is the wrong done to the people by corruption in the public service.

United States v. Levine, (C. C. A. 2d) 129 F. (2d) 745.

The *Levine* case points out that the person asking for or accepting the bribe need not have the power of final decision.

Cohen v. United States, (C. C. A. 9th) 144 F. (2d) 984; cert. den. 323 U. S. 797.

The *Cohen* case points out that the official action need not necessarily be prescribed by statute, or by written rules or regulations.

Also note:

Daniels v. United States, (C. C. A. 9th) 17 F. (2d) 339.

Conclusion.

It is respectfully submitted that there was substantial evidence of the guilt of the appellant, of both counts of the indictment, namely, the asking for and the receipt of the bribe in the sum of \$100, as charged.

It is submitted that the credibility of the witness Hubert Tomsone was a matter for the jury, and that his testimony was further bolstered by corroborating circumstances.

It is submitted that the appellant's defense, that he was investigating Tomsone and took the \$100 from Tomsone as a part of the scheme to entrap Tomsone, was submitted to the jury.

It is further submitted that the court did not err nor abuse its discretion in denying appellant's motion for a new trial, and that no other errors prejudicial to the appellant were committed at the trial; and that, therefore, the verdict and judgment of conviction should be affirmed.

Respectfully submitted,

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No. 11532.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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DEC 9 - 1947

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APPELLANT'S REPLY BRIEF.

I.

Consideration of Appellee's Statement of Facts.

A. Material Errors in Appellee's Statement of Facts.

Appellee has inadvertently made several material errors in its statement of the facts of this case which, because of their importance, we deem it necessary at the outset to call to the Honorable Court's attention.

1. Appellee's statement that the defense made no request to have the proposed witnesses appear in person at the hearing upon the motion for a new trial is erroneous.

On page 16 of its brief, appellee in describing the proceedings of the hearing of the motion for a new trial states: "No request was made by the defense to have any of the proposed witnesses appear in person * * *." Actually counsel for appellant specifically requested the Court to bring all of said witnesses into Court, but the

same was denied by the trial court. This fact was inadvertently overlooked by counsel for the Government, who has conceded the same to counsel for appellant since the submission of appellee's brief.

2. Appellee's statement that the motion for a new trial was submitted upon the affidavits of Joseph J. Cummins and Howard H. Davis is erroneous.

This statement of appellee is contained on page 16 of its brief. As pointed out in appellant's opening brief, and as is specifically shown in the transcript, the motion was submitted also upon the transcript of the recorded telephone conversations between Joseph J. Cummins, appellant's new counsel, and Drs. M. J. Hurst, David Levine, Charles Strachan, Theodore Kane, and Colonel Strayder. [Tr. pp. 19-~~20~~²¹] This fact is conceded by appellee in a subsequent portion of its brief (p. 17), but we deem it necessary to call the Honorable Court's attention to this error in the earlier portion of appellee's brief because of the important context in which it is there contained.

That the Government's purported counter-affidavit designated "Affidavit of Howard H. Davis in Opposition to Motions Made by Defendant" raises no actual conflict of fact material to the issues presented by the motion for a new trial, and that no issue of settlement of facts was involved nor were any findings of fact made upon said motion, is considered in detail in a later portion of this brief. (See Sec. II, B and C.)

3. Appellee's statement to the effect that the appellant kept the money received from Tomsone for a period of time, instead of promptly reporting to the proper authorities is erroneous.

This misstatement appears on pages 45 and 46 of appellee's brief, wherein appellee's counsel himself demonstrates how it prejudiced the witness, Dr. Strachan. This error *was also made by said counsel in his argument to the jury at the close of trial.* [Tr. p. 341.]

The *only* testimony in the case and in the record as to the time elapsing between appellant's return to his office and his apprehension and arrest therein by the Federal Bureau of Investigation is that of appellant to the effect that he was only in his office "*a couple of minutes*" [Tr. p. 257] before he was arrested, and that he intended to "go to Dr. Long (the Chief of the Out-Patient Department) and put it on his desk and say, 'Now hear the whole story,' " [Tr. p. 257] but was prevented from so doing because he was arrested so quickly. [Tr. p. 260.] *This testimony is absolutely uncontradicted.*

In his argument to the jury after the close of the case, the Government's counsel in referring to appellant, stated:

"But he walks into his office, there was a patient in his office, 10 or 15 minutes go by before the FBI apprehends and arrests him and they find him red-handed with this money in his pocket." [Tr. p. 341.]

While we feel that this error of the Government's counsel was the result of mere inadvertence, we feel constrained to call it to the Honorable Court's attention because of its prejudicial effect to appellant, both in the eyes of the jury in reaching their verdict and in the eyes of the witnesses as shown by appellee's own brief regarding Dr. Strachan. (Appellee's Br. p. 45.)

That this error must have prejudicially influenced the jury in arriving at its verdict is vividly illustrated by

the reaction thereto of the witness, Dr. Strachan, as demonstrated by the Government itself on page 45 of its brief, wherein counsel for the Government quotes a portion of the telephone conversation between Joseph J. Cummins and Dr. Strachan. The entire statement of Dr. Strachan on this subject was as follows [Tr. p. 29]:

"Dr. S.: And there's another thing that kind of weakens the case, and that is that it was important enough for him to go downstairs to get a cup of coffee when there were a lot of patients waiting; it was important enough for him to go out to his car to get some papers that he was working on, while there were patients waiting, but after he had the money in his pocket, there were a lot of patients waiting in the hall and they were more important than getting rid of the guilt—getting rid of the money . . . and that is a hard thing to beat.

JJC: That's a hard thing to try to make a jury swallow.

Dr. S: That's right. I think *that* was the thing that swung the jury." (Italics ours.)

Counsel for the Government then contends on page 45 of appellee's brief:

"We feel that there is considerable weight in the above-quoted observation of Dr. Strachan. Dr. Strachan's observation is most logical. *The jury probably reasoned likewise.*" (Italics ours.)

It is submitted that the reason that the jury reasoned likewise and did not believe appellant's excuse or explanation was due to the aforesaid inadvertent error on the part of counsel for the prosecution.

B. Appellee's Statement of the Facts as Hereinabove Corrected Confirm the Basis of Appellant's Assignment of Errors.

As stated in appellant's opening brief, appellant's contention was and is that the prosecution's chief witness, Hubert Tomsone, whose reputation for truth, honesty and integrity was severely attacked at the trial, attempted to bribe him, that he was conducting an investigation of Tomsone, that he took the one hundred dollars (\$100.00) from Tomsone as part of his scheme of entrapping him, and that the entire conviction rests on the testimony of said Tomsone since the only evidence of *solicitation* and *intent* was the testimony of Tomsone himself as to secret conversations had solely between Tomsone and appellant, that (1) appellant, rather than Tomsone, was the solicitor of the bribe, and (2) that appellant had the intent to have his decision and action influenced thereby.

On page 43 of appellee's brief the Government itself states: "The Government concedes that the case against appellant is based largely on the testimony of the witness Tomsone." Actually it rests *solely* on the testimony of Tomsone, since there is no other evidence whatsoever of solicitation and intent on the part of appellant.

In Section IV of appellee's brief (pp. 43-46) the Government sets forth the few alleged facts which it characterizes as "corroboration of the testimony of Tomsone." One of these alleged corroborative facts is that the appellant kept the money he had obtained from Tomsone for a period of time, instead of promptly reporting the same to the proper authorities. As hereinabove pointed out, this statement is not true, but is the result of an inadvertent error on the part of counsel for the prosecution.

The remaining allegedly corroborated facts were all admitted in appellant's opening brief. On page 44 of its brief the Government states that Mr. Duncan, Assistant Manager, testified that he witnessed Dr. Gage and Mr. Tomsone meeting each other on October 3, 1946, at the corner of Wilshire and Sawtelle Boulevards and then have lunch together at the Mayfair Cafe in Santa Monica. However, Mr. Duncan also testified that he did not hear any of the conversations between Dr. Gage and Mr. Tomsone. [Tr. p. 184.] Therefore, any evidence of intent or solicitation must still be based upon the sole testimony of Tomsone. The mere physical fact of the meeting falls directly in line with appellant's contention that he was investigating and trying to entrap Tomsone.

On the same page the Government states that Mr. Duncan testified that he talked to Mr. Tomsone with respect to matters Mr. Tomsone reported that were transpiring between Dr. Gage and Tomsone. However, there is no testimony in the case as to any of the contents of such conversation.

On page 44 of its brief the Government states that Dr. Long testified that either during the latter part of September or early part of October, 1946, Mr. Tomsone called to his attention the conversation that he, Tomsone, had with Dr. Gage. First, this was not the testimony of Dr. Long. Dr. Long testified that Tomsone, sometime either in the latter part of September or early in October of 1946, came to him and discussed with him "a matter that he wanted to call to his attention with regard to conversations he had had with Dr. Gage." [Tr. p. 114.] This does not infer that Dr. Long had a discussion with Tomsone regarding any specific conversation with Dr.

Gage, as inferred in the paraphrased statement of Dr. Long's testimony contained in appellee's brief. Furthermore, there is no evidence in the case as to any of the contents of the conversation or discussion between Dr. Long and Tomsone.

Appellee on page 44 of its brief then refers to the testimony of Agent Davis of the FBI regarding the physical facts of Dr. Gage going to the auto park with Tomsone, the fact that Gage took the one hundred dollars (\$100.00) from Tomsone, and that the serial numbers thereof checked with the serial numbers taken therefrom prior to the incident. All this is admitted in appellant's opening brief, and it was there and is now again submitted that all of these physical facts are consistent with appellant's contention that he was investigating and trying to entrap Tomsone.

It is therefore clear that there is no evidence, direct or otherwise, in the case corroborative of Tomsone's testimony regarding solicitation and intent on the part of appellant. Since the above constitutes all the allegedly corroborative evidence of Tomsone's testimony set forth in appellee's brief, the conclusion is inescapable that the entire conviction rests upon the sole testimony of Tomsone as to conversations between himself and appellant at which no other persons were present. This is fatal to the Government's case. It is one of the major factors establishing an abuse of discretion by the trial court in denying the motion for a new trial to allow the newly discovered evidence to get to the jury, which, under said circumstances, would quite probably shift the delicate balance of reasonable doubt to the favor of appellant. It is also one of the major reasons for requiring a reversal upon the ground

that the evidence in the case is insufficient to sustain the verdict and judgment.

Actually, the corroboration is all in favor of appellant because of the inherent improbability of Tomsone's testimony as to said secret conversations in the light of the following uncontradicted facts set forth in appellant's opening brief, which are not attacked in the Government's brief:

1. At the time appellant is accused of engaging in bribery activities in return for a continuous weekly stipend, the uncontradicted evidence shows that he intended to and did file documents for resignation from said Veterans' Administration.

2. Tomsone's testimony is to the effect that appellant commenced to solicit him for a bribe the second time appellant had ever met him, which was only four days after the admitted bitter argument between appellant and Tomsone.

3. Although Tomsone testified that the basis of the alleged bribe was the promise of appellant to overprescribe and thereby increase the sale of orthopedic shoes, the uncontradicted evidence shows that appellant asked for and was assigned two other doctors in his department to assist him, each of whom had the same authority as appellant to independently examine and prescribe shoes.

4. That appellant originally accepted his position with the Veterans' Administration as a temporary and interim position until he passed the California State Board Medical examination.

II.

Appellee's Brief Presents No Conflict of Fact nor Was Any Conflict of Fact Before the Trial Note C on the Motion for a New Trial.

The evidence presented by appellant on his motion for a new trial on the newly discovered evidence phase is contained in the affidavit of Joseph J. Cummins and the transcript of the recorded telephone conversations between said Joseph J. Cummins and Drs. Hurst, Levine, Strachan, Kane and Colonel Strayder, which establish that during the period that appellant is accused of engaging in bribery activities, appellant had on numerous occasions stated to certain of the doctors at the Veterans' Administration, among other things, that he felt Tomsone was "paying somebody off" and that he, appellant, was trying to get him; that appellant was always complaining about Tomsone's work and was investigating the same; and that appellant was undertaking an investigation and finding out certain things and that, as a consequence, there would probably be some "fireworks" or "fur flying." [Tr. pp. 19-60.]

A. The Government's Contention That Appellant's Statements Were Confined to a Letter Is Totally Unsupported by the Evidence.

On pages 19 and 20 of its brief the Government contends the statements that Dr. Gage was making an investigation and that there would be "fur flying" or "hell popping" were confined to a letter written by appellant to Washington. This is merely a conclusion on the part of the Government and is not borne out by the facts.

First, the newly discovered evidence is not confined to statements of an investigation and that there would be

“fur flying” or “hell popping.” Such statements as he, appellant, felt Tomsone was paying somebody off, and that he was trying to get Tomsone, and that appellant was always complaining about Tomsone’s work and was checking on that, cannot possibly have any relation to said letter, as a reading of said letter will quickly reveal.

Furthermore, a complete reading of the transcript of said telephone conversations shows that the only person who regarded Dr. Gage’s reference to “hell popping” or “fur flying” as pertaining to the letter to Washington, was Dr. Kane. None of the other witnesses even referred to or mentioned the letter at all during their entire conversations except Dr. Levine, and Dr. Levine specifically stated that Dr. Gage’s statements regarding “fireworks” and “fur flying” were *not* in reference to the letter. We refer the Honorable Court to Dr. Levine’s actual statements at pages 36 and 37 of the transcript:

JJC: Well, I mean state that he had stated to Dr. Levine in the presence of others that he had written a letter to Washington and that there was going to be some ‘fire works.’

Dr. L: Well I wouldn’t say it along that—that as a consequence of the letter—there was going to be some ‘fire works.’

JJC: Oh! . . . How did he put it, doctor?

Dr. L: Oh, he told me—well he mentioned even before that—as I recall it—that he had apparently hit upon something . . . and that he was going to follow it through.

JJC: Uh huh.

Dr. L: And that subsequently that there would probably be something along that line, but I don't recall—

JJC: Uh huh.

Dr. L: That *wasn't* said in reference to his letter to Washington." (Italics ours.)

The fact that the remaining witnesses did not even mention the letter in their conversations shows either that Dr. Gage did not mention the letter to them, or that they did not connect his said statements with the letter.

Even the testimony of Dr. Kane, referred to at length in appellee's brief, can offer no solace to the Government, for he testified that Dr. Gage was always complaining about the quality of Tomsone's work and that Dr. Gage stated to him that he was checking on *that*. (Italics ours.) [Tr. p. 58.] This statement clearly refers to an investigation by appellant regarding Tomsone and his work.

On page 19 of its brief the Government quotes from Agent Davis' affidavit regarding Dr. Hurst:

"Dr. Hurst, did know that Dr. Gage had said that he was investigating something and a day or so later he, Dr. Gage, had said that he had written a letter to Washington."

Even taken at face value, this quotation itself merely shows that Dr. Gage stated he had written a letter to Washington. It certainly does not indicate that the investigation was in reference to the letter. But further, a reading of the actual conversation between said Dr. Hurst and Joseph J. Cummins [Tr. pp. 54-56] discloses that Dr. Hurst made no reference to the letter whatsoever dur-

ing said entire conversation, which indicates that Dr. Hurst at that time did not interpret the reference to an investigation to be in connection with the letter. Finally, in the same recorded telephone conversation Dr. Hurst specifically stated that Dr. Gage told him that he, Dr. Gage, felt Tomsone was “paying somebody off” and that he was “trying to get him.” [Tr. p. 54.] Clearly, this latter statement can have no possible connection with the letter.

B. Appellee's Excerpted Quotations From the Recorded Telephone Conversations Presents No Contradiction to the Evidence Submitted by Appellant.

The Government on pages 24-28 of its brief sets forth various excerpted portions of the aforementioned recorded telephone conversations between Joseph J. Cummins and Drs. Kane, Strachan, Levine, and Strayder. It does not quote any portions of Dr. Hurst's conversation.

A complete reading of all these conversations will disclose that they contain evidence to the effect that during the period that appellant is accused of engaging in bribery activities appellant had on numerous occasions stated to various doctors in the Veterans Administration, among other things, that he felt Tomsone was “paying somebody off” and that he was trying to get him; that he was always complaining about Tomsone's work and was investigating same; that he was undertaking an investigation and that, as a consequence, there would probably be some “fire-works” or “fur flying.”

Obviously, as said transcript of the conversations shows, some of these statements were made by appellant to certain of said doctors, some were made to other of said doc-

tors, and some were made to all of said doctors. Not all of the statements were made nor did appellant ever contend they were all made to all of said doctors. Appellant's opening brief correctly assigns the specific statements to the specific doctor or doctors who made them. This appears on pages 13-23 of appellant's opening brief, wherein portions of the actual transcribed recorded conversations are set forth. The total of said evidence is also correctly set forth in appellant's opening brief.

The Government's technique in attempting to attack these statements by excerpted quotations from these telephone conversations consists of ~~asking~~^{quoting} specific questions of each individual witness upon those specific matters which that witness was not attributed by appellant to have made, and thus naturally obtaining a negative answer thereto. The excerpted quotations in the Government's brief do not contradict the specific statements attributed to the proper witness by appellant and therefore do not attack any of the evidence submitted by appellant upon the motion for a new trial or in its opening brief. The Government has merely set up straw men and then proceeded to knock them down.

The Government has quoted small portions of the testimony of Drs. Kane, Strachan, and Levine, in which they testify that they do not recall appellant stating to them specifically that he was being bribed by Tomson. Appellant never contended that this specific statement was made by said Drs. Kane, Strachan, or Levine.

The specific statements regarding the fact that Tomson was paying somebody off and that Dr. Gage was trying to get him were made by Dr. Hurst [Tr. p. 54] and Dr. Colonel Strayder. [Tr. p. 49.] The Govern-

ment does not set forth any quotations of Dr. Hurst that such statement was not made by him. The Government attempts to avoid this statement by stating that Dr. Hurst, when subsequently interviewed by Davis of the Federal Bureau of Investigation, repudiated his statement. It is significant to note that this conclusion is submitted by the Government, in its own language, "without further comment." (Appellee's Brief p. 28.) The specific statement by Dr. Hurst as contained in his conversation with Joseph J. Cummins was made at a time when he was unaware of the fact that it was being recorded. A reading of Agent Davis' affidavit will show that, even under the fear and awe of severe cross-examination by an agent of the Federal Bureau of Investigation, Dr. Hurst did not actually repudiate this statement.

The Government's excerpted quotations from Dr. Colonel Strayder's conversation (Appellee's Br. pp. 27, 28), does not give the true picture thereof. Actually, Dr. Strayder did not refute the statement that Dr. Gage told him that Tomsone was paying somebody off. We quote his statements from page 49 of the transcript:

"JJC: Did he express himself that he thought perhaps Tomsone was sticking there because he was paying somebody off?

Dr. S.: Well, he didn't know.

JJC: He told me he told *you* that prior to his arrest.

Dr. S.: He might have mentioned it to me."

The remaining excerpted quotations from these telephone conversations contain questions directed to Drs. Kane, Strachan, and Levine as to whether Dr. Gage ever told them that Tomsone was trying to bribe him. Appel-

lant never contended that these specific individuals gave such testimony in these recorded telephone conversations, and consequently the negative answer which the Government ~~obtained~~^{quotes} is not contradictory to the evidence submitted by appellant. However, these doctors did testify to the other vital statements ~~evidence~~.

Dr. Kane, upon whom the Government dwells at great length on pages 24 and 25 of its brief, did specifically state that appellant was always complaining about the quality of Tomsone's work, and that Dr. Gage told him he was checking on that. [Tr. pp. 58, 26.] This is not contradicted by the Government.

Dr. Strachan, whose excerpted portion of the conversation is quoted on page 26 of appellee's brief, did testify that appellant on more than one occasion made the statement that he was working on something and that one of these days "hell will be popping" or there will be "fur flying" or words to that effect. [Tr. pp. 52-53.] This is not contradicted by the Government.

Dr. Levine, the next person who is quoted in appellee's brief (p. 26), did state that appellant was always complaining about how bad Tomsone's shoes were, appellant told him that he, Dr. Gage, was going to do something about it; that appellant stated to him that there was "something fishy in Denmark" and that he was finding out certain things that were going on and that, as a consequence, there would probably be some fireworks. This is not contradicted by the Government. [Tr. pp. 33-35.]

Dr. Hurst further stated that Dr. Gage on several occasions stated that he was making an investigation and that there might be "fur flying" or "hell popping" or

words to that effect. [Tr. p. 54.] This is not contradicted by the Government.

Dr. Levine further testified that Dr. Gage told him he had apparently hit upon something and was going to follow it through. [Tr. p. 37.] This is not contradicted by the Government.

We wish, in passing, to refer to the Government's reference to Dr. Kuhn's refusal to testify contained on page 27 of appellee's brief. The Government states that Dr. Kuhn merely showed a disposition to not testify. As shown by the two recorded telephone conversations between Dr. Kuhn and Joseph J. Cummins, set forth in full on pages 21-23 of appellant's opening brief, Dr. Kuhn's reaction was not merely of a disposition not to testify, but was based upon fears of pressure, influence, and complications. We refer the Honorable Court to said portion of appellant's brief. The Government further states that, though affiant Cummins told Dr. Kuhn he might have to subpoena him, no subpoena was ever obtained. The reason no subpoena was ever obtained was because the trial court refused Affiant Cummins' request to have said witnesses appear in person in Court, as heretofore pointed out.

C. The Affidavit of Howard H. Davis Presents No Contradiction to the Evidence Submitted by Appellant.

The excerpts from Davis' affidavit and a discussion thereof is contained in pages 28-30 of appellee's brief. We respectfully request the Honorable Court to read the entire affidavit of Howard H. Davis appearing on pages 61-68 of the transcript. A full reading thereof will disclose that said affidavit is nothing more than a repetition

of the identical matter contained in the excerpted quotations from the recorded transcriptions set forth on pages 24-28 of appellee's brief, which we have just considered. It merely repeats the same question and responses of each specific witness that are contained in appellee's excerpted quotations from the telephone conversations, which, as we have just considered, merely present denials from each specific witness only of statements which appellant never contended that specific witness made. It does not contradict any statement of any particular witness which was attributed to that witness by appellant, and therefore does not contradict the aggregate evidence submitted as contended by appellant. It is the straw man technique again.

An inspection of the Davis affidavit will also reveal that the statements therein are only compared with and directed against the Cummins affidavit. The Cummins affidavit is merely a short document referring to and combining and paraphrasing the complete recorded telephone conversations of all the proposed witnesses. It does not purport nor attempt to assign the particular statements to the proper witnesses, as this was left to the transcription of the recorded conversations itself which was submitted upon the motion for a new trial. The Davis affidavit cannot, therefore, contradict the Cummins affidavit, because the Davis affidavit refers to specific statements of specific individuals and the Cummins affidavit does not distinguish between the various persons who made the specific statements.

When the Davis affidavit is compared with the transcript of the complete recorded telephone conversations, wherein the specific statements are assigned to the proper persons who made them, it will be found that the Davis affidavit merely takes from the excerpted quotations of the telephone conversations set forth at pages 24-28 of the Government's brief the specific statements which are there shown not to have been made by the specific witness referred to. They are therefore the same statements which, as just analyzed in subsection B of this section II hereof, appellant never contended the specific witnesses who disclaim them ever made. And in the identical manner as the Government's said excerpted quotations, the Davis affidavit does not contradict or deny any specific statement made by the person to whom it was properly assigned by appellant, and therefore does not contradict or deny, in any respect, the aggregate evidence submitted by appellant.

Because of the foregoing, an analysis of the Davis affidavit and its total lack of contradiction to the evidence submitted by appellant would be identical with our analysis and conclusions of the Government's excerpted quotations which we have already set forth in subsection B of Part II of this brief. We therefore refer the Honorable Court to that portion of this brief, since it would serve no useful purpose to unduly lengthen this brief at this point by what would of necessity be an almost identical repetition thereof.

III.

**Appellant's Authorities on Newly Discovered Evidence
Are Not Applicable to the Case at Bar.**

The case of *U. S. v. Johnson*, 327 U. S. 106, cited by appellee and considered at length in its brief is not applicable to the case at bar. In that case motions for a new trial were made on the ground that one Goldstein, a Government witness, had perjured himself. As stated in appellee's brief, numerous affidavits by both the defendants and the Government were presented upon the motion for a new trial. The trial court considered all these affidavits and *found* that Goldstein had not perjured himself, and on such finding denied the motions for a new trial. The Circuit Court reviewed all said affidavits *de novo* and made a contrary finding of fact therefrom that Goldstein had perjured himself and therefore reversed the trial court's said findings of fact.

The Supreme Court held that the trial court had made a *Finding of Fact* upon the motion for a new trial that Goldstein had not perjured himself and, since there was sufficient evidence in the affidavits to support the trial court's findings of fact, the appellate court should not substitute its findings of fact for that of the trial court.

That the Supreme Court decision applies only to a review of a ruling upon a motion for a new trial when the review is sought on the alleged ground that the trial court made erroneous findings of fact, is clearly pointed out by the italicized portions of the following quotations from the

Supreme Court decision, as set forth in the Government's own brief (pp. 22-23):

"Since we think it important for the orderly administration of criminal justice that *findings on conflicting evidence* by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari.

"* * * But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial *when such review is sought on the alleged ground that the trial court made erroneous findings of fact*. *Holmgren v. United States*, 217 U. S. 509; *Holt v. United States*, 218 U. S. 245; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 481. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, *cf. United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247; *Glasser v. United States*, 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence."

"The circuit court of appeals was right in the first instance, when it declared that it did not sit to try *de novo* motions for a new trial. It was wrong in the second instance when it did review the *facts de novo* and order the judgment set aside." (Italics ours.)

The Government itself, in discussing the *Johnson* case, discloses this point on page 23 of its brief, where it states "a motion for a new trial should not be granted when such review is sought on the alleged ground that the trial court made erroneous findings of fact. It is only when the findings of fact are wholly unsupported by evidence that such a motion should be granted."

The *Johnson* case is therefore not applicable to the case at bar for the following reasons:

1. The Government's counter-affidavit of Howard H. Davis, as heretofore considered, does not contradict a single fact presented by the affidavit of Joseph J. Cummins, and the transcription of the recorded telephone conversations upon which the newly discovered evidence portion of the motion for a new trial was based. There was therefore no evidence before the trial court on the motion for a new trial contradictory to that submitted by appellant.

2. The trial Court did not make any findings of fact that Dr. Gage did not make any of the statements set forth in said document or that any of the witnesses did not make the statements presented, nor did the trial Court base its denial of said motion upon any such ground.

On pages 32-35 of its brief the Government sets forth numerous cases regarding the Court's discretion in denying a motion for a new trial. These cases in effect hold that the granting of a new trial on the ground of newly discovered evidence is discretionary with the trial Court and will not be disturbed on appeal in the absence of an abuse of discretion. In this respect the Government cites *Long v. United States* (139 F. (2d) 652), *Bracher v. United States* (149 F. (2d) 742), and *Roberts v. United States* (137 F. (2d) 412). Appellant has not and does not now attack this principle. Appellant's ground for appeal from the denial of the motion for a new trial on the ground of newly discovered evidence is based on the ground that the trial Court abused its discretion under the facts and circumstances of the instant case. This is clearly set forth in Appellant's Opening Brief.

The Government also cites *Evans v. United States* (122 F. (2d) 461) and other authorities to the effect that the alleged newly discovered evidence must be such that it probably would change the result. As heretofore pointed out in Appellant's Opening Brief under the circumstances of this case where the sole evidence of appellant's intent and solicitation of bribery rests upon the sole word of a man whose credibility and reputation was seriously attacked at the trial as to conversations had between himself and appellant and at which no other persons were present, it was an abuse of the trial Court's discretion to refuse a new trial to enable the vital proffered evidence to be submitted to the jury. We believe that said evidence, in the light of the aforesaid circumstances and the inherent improbability of Tomstone's testimony, would definitely shift the delicate balance of reasonable doubt to the favor of appellant.

The jury is entitled to have this vital evidence placed before it.

The Government cites *United States v. Reid*, 49 Fed. Supp. 313, and other cases to the effect that a new trial is not warranted by affidavits of allegedly newly discovered evidence designed only to impeach a witness. The evidence of appellant's statements and disclosures to the various doctors at the Veterans' Administration is not merely impeaching evidence. It is the very basis of appellant's defense to the effect that he did not have the intent of which he was charged. (*People v. Skaggs*, 80 Adv. Cal. App. 93, 108.)

The Government contends that a new trial will not be granted for newly discovered evidence which is merely cumulative. The evidence of appellant's statements to the various doctors is not cumulative but is entirely new

testimony and goes to the very basis of appellant's defense. Furthermore, a motion for a new trial for newly discovered evidence which is based upon falsification or mistake, as in the case at bar, will not be denied merely because the testimony is cumulative.

Martin v. United States, 17 F. (2d) 973;

United States v. Miller, 61 Fed. Supp. 919;

Pettine v. Territory of New Mexico, 201 Fed. 489.

The Government contends that a new trial will not be granted on the ground of newly discovered evidence unless there is a showing that said evidence could not have been produced before the trial began. First, the recorded telephone conversation between Joseph J. Cummins and Dr. Ralph H. Kuhn [Tr. pp. 45-47] make a vivid showing of the fears and pressure that existed and that the evidence of the remaining doctors could not have been obtained except under the circumstances of recording their telephone conversations when they were unaware of the same. Second, it is a fundamental principle of law in the Federal Courts that a new trial will be granted upon the ground of newly discovered evidence when a witness of the original trial admits that he committed perjury *or even that he was mistaken in his testimony*. *Martin v. United States*, 17 F. (2d) 973; *United States v. Miller*, 61 Fed. Supp. 919. Under such circumstances no showing need be made as to why the evidence was not obtained before trial since perjury or mistake during trial cannot be determined before trial.

IV.

The Trial Court Erred in Denying the Motion for a New Trial on the Ground of Newly Discovered Evidence of Two Convictions for Theft by Hubert Tomsone, the Governments Chief Witness.

The records of the two convictions for theft referred to in the affidavit of Joseph J. Cummins are misdemeanors and not felonies. However, this does not render them inadmissible.

The Government's contention that a witness cannot be impeached by the record of a conviction for crime unless the same is a felony, is a statement only of the California law and the Government cites and relies upon Section 2051 of the California Code of Civil Procedure for this contention. (Appellee's Br. pp. 35-36.)

However, California State law on this subject is not applicable in the case at bar. *Rule 26 Federal Rules of Criminal Procedure* provides:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The Advisory Committee Notes to this rule state:

"2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43(a)), in that this rule contemplates a uniform

body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.”

Under the federal rules the record of a conviction of crime is admissible for the purpose of attacking the credibility of a witness if the conviction is a felony, an infamous crime or a crime involving moral turpitude. (*Pittman v. United States*, 42 F. (2d) 793, 795.) It is not limited to felonies. Clearly a crime of theft is one involving moral turpitude.

Furthermore, the question of said convictions arose during the testimony of Fred Skill, whose testimony was interrupted and stricken upon the Court's own motion on the ground that it was too remote. Skill was testifying as to the general reputation and character of the witness Tomsone and was about to base part of his testimony upon said convictions. The records of said convictions

are therefore also admissible to corroborate this testimony of Fred Skill if the Court should rule that his testimony was improperly stricken and also to show that the testimony of Fred Skill was not too remote since it was based partially upon said convictions of a crime involving moral turpitude.

V.

The Trial Court Erred in Striking the Testimony of Fred Skill and Preventing Him from Completing His Testimony.

The nature of Fred Skill's testimony has been set forth in detail in Appellant's Opening Brief. The Government's only answer to this is that the ruling thereon is within the discretion of the trial Court. It is appellant's contention that the trial Court did abuse its discretion in this matter.

The testimony of Fred Skill which was excluded, when taken together with the two War Veterans, whose testimony was admitted, is conclusive that Tomsone had not changed his character in the last twelve years, and thus it was prejudicial error to strike the testimony of Skill.

The abuse of the trial Court's discretion is exaggerated under the circumstances of the case at bar, since Tomsone was the chief Government witness, without whose testimony the defendant could not have been convicted. The jury was entitled to have before it the character and reputation for truth and veracity of the witness twelve years ago, as well as at the time of the trial.

VI.

The Evidence Is ^{It}_{is} Sufficient to Support the Verdict.

On this point the Government cites authorities to the effect that an appellant court will rarely substitute its views on the weight of the evidence for those of the jury. The contention of appellant is that the only direct evidence in the case that appellant had the necessary intent rests upon the sole word of Hubert Tomson. The proven bad reputation of Tomson and the inherent improbability of his testimony as to said conversations has already been considered. Because of this there is actually no evidence in the case of intent upon which the verdict and judgment can be sustained.

Respectfully submitted,

JOSEPH J. CUMMINS,
Attorney for Appellant.







Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1947.

No. 11,532.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

JOSEPH J. CUMMINS and

DAVID H. PALTUN,

739 South Hope Street, Los Angeles 14,

Attorneys for Appellant.

FILED

MAY 22 1948

PAUL P. O'BRIEN,



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No. 11,532.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

To the Honorable Judges of the Ninth Circuit Court of Appeals:

Appellant, Theodore S. Gage, respectfully petitions the Honorable Court for a rehearing of the within appeal upon the following grounds:

1. The Court's written opinion affirmatively shows that it inadvertently overlooked the fact that the exhibit referred to in the opinion expressly indicates that appellant stated that Tomsone was endeavoring to bribe him.

2. Further consideration should be given to the misstatement of the prosecuting attorney to the jury, since it goes to the very heart of appellant's defense, and must have finally determined the jury's verdict.

3. The rejection of the evidence of convictions for theft of Hubert Tomsone and the testimony of Fred Skill should be reconsidered, since they were properly presented, were legally admissible, and in view of the peculiar facts of this case would have substantially affected the jury's verdict.

ARGUMENT.

I.

The Court's Written Opinion Affirmatively Shows That It Inadvertently Overlooked the Fact That the Exhibit Referred to in the Opinion Expressly Indicates That Appellant Stated That Tomsone Was Endeavoring to Bribe Him.

On page 4 of its Opinion, the Honorable Court in referring to the exhibit submitted upon the Motion for a New Trial containing the telephone conversation between Joseph J. Cummins, appellant's attorney, and several of the doctors at the Veterans' Administration, states: "Nothing in the exhibits indicates that appellant had at any time stated that Tomsone was endeavoring to bribe him." This statement indicates that the Honorable Court inadvertently overlooked the following portions of said exhibit:

A. Portion of conversation between Joseph J. Cummins and Dr. M. J. Hurst:

"JJC. Uh-huh. Did he ever tell you that he was trying to get Tomsone; that he felt that Tomsone was paying somebody off and he was trying to get him?

Dr. H. Yes, uh-huh." [Tr. p. 54.]

B. Portions of conversation between Joseph J. Cummins and Dr. Colonel Strayder:

"JJC. Did he express himself that he thought perhaps Tomsone was sticking there because he was paying somebody off?

Dr. S. Well, he didn't know.

JJC. He told me he told *you* that prior to his arrest.

Dr. S. He might have mentioned it to me.” [Tr. p. 49.]

Since this newly discovered evidence concerns appellant’s basic defense (*People v. Skaggs*, 80 A. C. A. 93), and if presented to the jury could materially have affected the jury’s verdict, we respectfully request the Honorable Court to reconsider the same upon rehearing.

II.

Further Consideration Should Be Given to the Misstatement of the Prosecuting Attorney to the Jury, Since It Goes to the Very Heart of Appellant’s Defense, and Must Have Finally Determined the Jury’s Verdict.

It is undisputed that the only evidence in the case as to the length of time elapsing between appellant’s return to his office after accepting the money and his apprehension by agents of the Federal Bureau of Investigation was not more than a couple of minutes. It is further undisputed, and admitted by the prosecuting attorney, that the statement to the jury that appellant remained in his office for fifteen minutes after accepting said money was inadvertent error. In view of the fact that the theory of the defense was and is that appellant had accepted the money with the intention of turning it over to his superiors and thus entrapping Tomson, the Government’s chief witness, this error strikes at the very basis of appellant’s defense without any support in the evidence.

Since the prosecuting attorney himself made such admitted inadvertent error in disregard of the sworn testimony, can it be said that the jury, who are untrained in legal procedure and analysis of evidence, in spite of their intelligence, can be assumed not to have made the same error as the prosecuting attorney? If the jury accepted the prosecuting attorney's statement, as we submit it must have done to arrive at its verdict under the remaining facts of the case at bar, the same so seriously injured appellant as to deny him a fair trial.

In view of the foregoing, it is respectfully submitted that the same should be reconsidered by this Honorable Court and a redetermination made as to whether the same comes within *Rule 52(b), Rules of Criminal Procedure*, and the cases of *Edgmon v. United States*, 87 F. (2d) 13; *Meadows v. United States*, 82 F. (2d) 881; *Lindsey v. United States*, 133 F. (2d) 368; *Thomas v. District of Columbia*, 90 F. (2d) 424, which permit the Appellate Court to take notice of such error in the absence of objection or assignment thereof.

III.

The Rejection of the Evidence of Convictions for Theft of Hubert Tomsons, and the Testimony of Fred Skill Should Be Reconsidered, Since They Were Properly Presented, Were Legally Admissible, and in View of the Peculiar Facts of This Case Would Have Substantially Affected the Jury's Verdict.

It should be recalled that the conviction in this case is based almost solely upon the testimony of said Hubert Tomsons, and that said testimony consisted entirely of conversations had between said Tomsons and appellant at which no other persons were present. Under such circumstances the character, credibility and veracity of said Hubert Tomsons were vital. The submission of such impeaching evidence to the jury under such circumstances could not help but greatly affect their verdict.

A. The evidence of the two convictions for theft of the said Hubert Tomsons was properly and legally presented. The Court will recall that during the argument of this appeal before the Honorable Court, Joseph J. Cummins, one of the counsel for appellant, stated to the Court that the officials of the Long Beach Jail refused to permit him to obtain certified copies of such records without court order; that said Joseph J. Cummins, upon the hearing of the Motion for New Trial, and in the presence of the prosecuting attorney, requested the Honorable Trial Judge, Peirson M. Hall, for such an order, but that the same was refused by said trial judge; that the prosecuting attorney verified the foregoing to this Honorable Court

at said time and place. Appellant therefore made the best and fullest presentation of said records as was possible.

B. The fact that the affidavit does not indicate whether said convictions were for felonies or misdemeanors is immaterial. The affidavit specifically indicates that the same were for theft, which clearly is a crime involving moral turpitude. Under the new Federal Rules of Criminal Procedure it is expressly provided that in criminal cases, as distinguished from civil cases, the state law regarding admissibility of evidence shall not be applicable, but that the general Federal Rules shall apply. Rule 26 of the Federal Rules of Criminal Procedure provides:

“In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”

The Advisory Committee Notes to this rule state:

“2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43(a)), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal juris-

diction is based on diversity of citizenship the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.”

Under the Federal Rule the record of a conviction of crime is admissible for the purpose of attacking the credibility of a witness if the conviction is a felony, an infamous crime or a *crime involving moral turpitude*.

Pittman v. United States, 42 F. (2d) 793, 795.

Clearly, the admissibility of a record of conviction of crime under the Federal Rule is not limited to felonies; clearly, the crime of theft is one involving moral turpitude.

It is respectfully submitted, therefore, that a rehearing should be granted herein.

Respectfully submitted,

JOSEPH J. CUMMINS and

DAVID H. PALTUN,

Attorneys for Appellant.

Certificate of Counsel.

David H. Paltun, one of the counsel for appellant, hereby certify that the petition for rehearing herein is filed in good faith, and believe the points raised are meritorious and not for purposes of delay.

DAVID H. PALTUN.

No. 11,533

United States
Circuit Court of Appeals
For the Ninth Circuit

STEPHEN SORRENTINO, also known as
VINCENT SORRENTINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division

BRIEF FOR APPELLANT

FILED

JUN 21 1947

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United States
Circuit Court of Appeals
For the Ninth Circuit

STEPHEN SORRENTINO, also known as
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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Stephen Sorrentino, was indicted for violating the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557, and the Jones-Miller Act, 21 U.S.C. 174 (R. 2-3). The indictment was in two counts, the first charging that appellant, contrary to the Harrison Narcotic Act, sold opium "not in or from the original

stamped package,” and the second charged appellant with fraudulently and knowingly concealing and facilitating the concealment of the lot of opium described in the first count, contrary to the provisions of the Jones-Miller Act (R. 2-3).

Appellant pleaded “not guilty” to the indictment (R. 4-5), and after a trial by jury, was convicted on both counts (R. 132). After denial of his motions for a new trial and in arrest of judgment (R. 130-131), he was sentenced to a term of five years in a Federal prison on count one of the indictment and to a term of ten years under count two, and to pay a fine of \$1,000.00, the sentences on the two counts to run concurrently (R. 132).

The District Court had jurisdiction of this action by virtue of provisions of 28 U.S.C.A. sec. 41, subd. 2, which provides that the District Courts shall have original jurisdiction “of all crimes and offenses cognizable under the authority of the United States,” and by virtue of the following Amendment—Six—to the Constitution of the United States:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.”

This Court has jurisdiction to review the judgment by virtue of 28 U.S.C.A. sec. 225, which provides: “The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions,—First in the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court, under section 345 of this Title.”

The pleadings on which jurisdiction is based are the Indictment (R. 2-3) and the Plea of not guilty (R. 4-5).

STATEMENT OF FACTS

The principal witness against appellant was a Government agent by the name of Jacob Lieberman, a man who had been convicted in 1931 for violating the Federal narcotic laws (R. 55). The alleged acts out of which the conviction arose occurred not between appellant and Lieberman, however, but between appellant and another man known to the Record interchangeably as "the informer" and Jerome Berry. The Government achieved this unusual result by having Lieberman observe what transpired between appellant and the informer and by then relying principally on Lieberman for testimony as to the transactions between the other two. This device was the source of the principal issue at the trial below. Appellant sought to establish, by cross-examining Lieberman and another Government witness—not "the informer"—that the can of opium here in question was produced by the informer, a drug addict (R. 62, 76), from his own private stock and that the can was not delivered to him by appellant as the prosecution alleged (R. 32-33, 41, 68-69). The Government objected to those questions, and the Court below sustained the objections, on the ground that the questions tended to reveal the identity of the informer and the Government was privileged to keep the informer's identity a secret. The respective contentions of the parties are dealt with more fully below.

Lieberman testified as follows: That he first met appellant about August 8, 1945 (R. 58, 60) and met with him and the informer a number of times on the succeeding days

(R. 59, 60). These meetings occurred in the room of one Jim Berry in the Uptown Hotel, Fillmore Street, San Francisco, or in the adjoining and connecting room of Lieberman (R. 59-60). At one of these meetings, on the 14th of August, the informer asked appellant to sell him a can of opium (R. 75). Appellant replied that he did not have it but would get it for the informer (R. 75-76). He promised to bring the can to the hotel the next evening around 11:00 o'clock (R. 76-77).

The following evening appellant appeared at the Uptown Hotel and met Lieberman in the hotel lobby (R. 65). Lieberman then called Berry, who was in his room, on the phone (R. 65-66). Berry and appellant then went down to the basement of the hotel and there they had a conversation which was overheard by a Government agent who had hidden himself in the basement earlier in the evening (R. 24). The conversation that ensued between appellant and the informer was described by the hidden agent as follows: "I heard the informer say, 'Did you bring the can of mud?' And the defendant said, 'No, I didn't bring it; I will later on tonight or tomorrow.' The informer then removed a roll of currency from his pocket and asked the defendant if he wanted the money then, and the defendant said, 'No, you can pay me at the time I deliver the stuff.' Shortly thereafter the defendant left the room * * *" (R. 25).

The informer and appellant then went to Berry's and Lieberman's rooms in the hotel (R. 66-67) where the informer requested appellant to bring a can of opium to 1678 Forty-fifth Avenue at 5:00 P.M. the following day (R. 52).

About 4:45 on the next afternoon, Lieberman and the informer met Grady, the Government agent who had hidden in the basement of the Uptown Hotel the previous evening, at Forty-seventh Avenue and Morago Street, a short distance from the place where the informer and appellant had agreed to meet (R. 54). The three men proceeded to Fortieth Avenue and Irving Street where Grady searched the informer and Lieberman and gave the informer a bundle of money (R. 55). The informer and Lieberman then went to a house at 1678 Forty-fifth Avenue, to which the informer had a key (R. 68). About 5:00 P.M. appellant appeared and delivered a can of opium to the informer and received some money from the informer (R. 53). Appellant departed (R. 54), and though appellant's departure from the house was observed by Agent Grady (R. 26-27), no effort was made to apprehend appellant and to search him for the money purportedly transferred to him by the informer.

Appellant, on the other hand, while admitting frequent conversations with the informer and Lieberman (R. 106), denied that he had ever discussed or smoked opium with Lieberman or with Berry as Lieberman had testified (R. 106). He further testified that he went to the house on Forty-fifth Avenue on the 16th of August but that he went there only to recover an expensive camera the informer had borrowed from a friend of his (R. 109).

The defense showed also that the Government had been after appellant for a number of years in an attempt to pin some crime on him (R. 44, 81, 83-87, 89, 93, 96, 110, 111, 120). Appellant's home was visited and searched by Government agents three separate times between 1941 and

1945 (R. 81-87) and on one of these visits appellant was physically abused by one of the searching agents (R. 81, 87, 89). Nothing incriminating was found on any of these visits (R. 91).

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON

1. That the Court erred in sustaining objections to questions propounded on cross-examination relating to one Jerome Berry.

2. That the Court erred in sustaining objections to questions propounded on cross-examination relating to the informer.

3. That appellant was twice put in jeopardy for the same offense.

Points one and two are based upon the following portions of the Record:

Record 31-33:

Mr. Duane. Q. Who is the Government informer?

Mr. Davis: I object to that, your Honor, on the ground that we are not either privileged to or required to disclose the identity of the man.

The Court: Sustained.

Mr. Duane: Q. Tell me, is it your own Jerome Berry, also known as Jimmy Berry?

Mr. Davis: I object to that question on the same ground.

The Court: Sustained. The Government has the right to keep the identity of the witness undisclosed.

Mr. Duane: Q. Do you know a man by the name of Jerome Berry, also known as Jimmy Berry?

A. Yes.

Q. You do. Was he residing in that hotel, the Uptown Hotel, on the 15th day of August, 1945?

Mr. Davis: I make the same objection again, your Honor. It is an indirect way of trying to disclose the identity of the informer.

Mr. Duane: Not at all, your Honor. I will say to your Honor that we have a subpoena out for Mr. Berry. Mr. Berry would be a very material witness in this case with reference to many matters. I want this jury to get the whole story.

The Court: Well, I will sustain the objection because you have already asked the question which calls for information that may not be disclosed. The Government is entitled to have it kept secret.

Mr. Duane: Well, I won't ask about the informer. Let me put this question.

Q. Was there a man by the name of Jerome Berry, an employee of that hotel—

Mr. Davis: I will make the same objection, your Honor. Counsel has already asked if Berry was the informer. That question has been objected to and stricken out. As to all the other questions, they are based on the same assumption.

The Court: The Court has to be guided by your questions. It would be a travesty upon justice if the Court allowed the examination to be pursued after you have named the man and asked the witness whether or not he is the informer. I will sustain the objection to any question along that line.

Record 41:

Q. You knew who occupied the house at that time?

A. Yes.

Q. And that was this informer that you speak of?

Mr. Davis: I object to that, your Honor. It is another means of identifying the informer.

Mr. Duane: I am not identifying the informer. It is a question I think I am entitled to an answer on.

The Court: I will sustain the objection. It is an indirect way of disclosing information which the law provided should be kept secret.

Record 68-69:

Q. Then what happened after that?

A. Well, we then went to 1678 Forty-fifth Avenue.

Q. Did anyone else let you in there?

A. The informer had a key.

Q. The informer had a key?

A. He opened up the door. We walked in.

Q. It was his home, wasn't it?

Mr. Davis: I will object to that.

The Witness: I don't know whose home it was.

The Court: Read the question, please.

(The question was read by the reporter.)

Mr. Davis: I objected to the question.

The Court: Sustain the objection on the ground the Government is entitled to keep secret the information concerning the informer. The Court has a duty not to allow such information to be disclosed. I think you should not pursue that, Mr. Duane, even indirectly, because it is improper.

Mr. Duane: I just want to say to your Honor this: It curtails the cross-examination to this extent, it is my purpose to show that at the time that that house was entered there was in that house cans of opium similar to this.

The Court: Well, you are not prevented from introducing any evidence that you wish to, but I don't see that the questions that you are asking have to do with that subject.

Mr. Duane: Only to this extent, if the Court please, I want to establish that it was the property of this so-called informer contained in his house.

ARGUMENT

I.

THE COURT BELOW ERRED IN REFUSING TO ALLOW APPELLANT TO PROPOUND QUESTIONS RELATING TO THE INFORMER AND JEROME BERRY.

Stripped of all embellishments, the Government's case against appellant rests on Lieberman's testimony that appellant, on August 16, 1945, at 1678 Forty-fifth Avenue, San Francisco, California, delivered and sold a can of opium to the informer. Appellant, on the other hand, categorically denied that he had delivered or sold any opium to the informer and insisted that though he visited the house in question at the time mentioned, he did so to recover a valuable camera that a friend of his had loaned to the informer (R. 109). The only issue before the jury, therefore, was whether appellant delivered the can of opium to the informer as the Government charged, or whether, as appellant contended and was attempting to

establish (R. 69), the can of opium came from the informer's own stock of the drug maintained in his own home at 1678 Forty-fifth Avenue.

To establish his case, appellant necessarily had to depend on cross-examining the Government witnesses. Obviously, he was not in a position, and could not reasonably be expected to be in a position, to show that, prior to his appearance at the house, he searched the informer's house and had found the can in question there. Until he was informed of the charge against him, there was no way or reason for him to have anticipated even the need for such a search. And, of course, it was impossible for him thereafter to show, other than by cross-examination, that the can had been in the informer's house before five o'clock on the 16th of August, when he met with the informer.

A careful analysis of the Record will show that this contention of appellant was not an idle one; for even in spite of the rulings of the Court against him appellant was within a short distance of proving his case. Appellant had shown that the Government inspectors were out to get him. For about four years preceding the events covered by this case, he had been closely watched and observed by the police. He was made a subject of inquiry among his friends and relatives (R. 93-96) and his home was searched on three separate occasions during this period (R. 81), each time without yielding any evidence of crime (R. 82, 89-90). On one of these occasions the dislike of one of the Government's agents for him resulted in his being struck in the face for no apparent cause (R. 92, 118). Other facts surrounding this case are equally signifi-

cant. The principal witness against appellant (Lieberman) was a convicted felon (R. 55) who was dignified for the purposes of this case with the title, "special employee of the Bureau of Narcotics" (R. 48), and his partner in detection (the informer, Berry) was a dope addict (R. 62, 76) whom the Government thought best not to call as a witness.

But of even greater significance to appellant's case are the omissions from duty and the testimony of Agent Grady. Although the character and reputation of the informer and Lieberman were well known to Grady, no effort whatever was made to determine whether or not they were framing appellant. Grady admitted (R. 42) that he had heard opium was being smoked in the informer's rooms but made no investigation to ascertain whether there was any truth in what he heard (R. 42). He admitted also (R. 41) that he knew who occupied the house at 1678 Forty-fifth Avenue (and we will show below that on the Record the house belonged to the informer). And yet, despite these facts, no search was made of the informer's house prior to appellant's visit to discover whether the informer had any opium of his own there, although it was very likely that he did. True, Grady did search Lieberman and the informer for narcotics before they left him to meet with appellant (R. 68), but that was an idle and empty gesture. Certainly, there was no purpose to searching them if they immediately were to be allowed to enter the informer's own home where it was likely he had a supply of opium. But perhaps even more illuminating is the failure of the Government to perform the simplest of all acts necessary

to prove appellant's guilt without question. Although Grady "saw the defendant leave the residence, enter his car, and drive away" (R. 27), presumably with the money, no attempt was made, as is the usual custom in such cases, to apprehend him and search him for the money!

Even without the opportunity to cross-examine the Government witnesses regarding the informer, therefore, appellant came within an ace of proving his case. If he had been allowed to cross-examine, as was his right, he probably could have proved his case in full; and certainly it must be conceded that by the Court's refusing him his right to cross-examine he was materially harmed and perhaps denied the only means by which he could have established his innocence.

The question then before this Court is, can there exist any court-made rule of law so flagrant as to deny to a defendant in a criminal case the only means by which he can establish his innocence, as the Court below ruled there was in this case? The question answers itself, and on logic alone, without any reference to cases or authorities, the answer must follow that the Court below erred.

It is not surprising, therefore, that the cases and authorities also are squarely opposed to the ruling of the Court below. The Court below applied automatically to this case the rule that the Government is privileged to withhold all information regarding an informer because "To inform is a statutory duty, and sound public policy forbids exposing informers to possible, even probable, evil consequences." *McInes v. United States*, 62 F.(2d) 180, 181 (C.C.A. 9). BUT, "There is * * * an exception to this rule or a modification of this general doctrine, in that

it gives way to another doctrine of the law when the two conflict. *A trial court must dispose of the cause before it. If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled.* [Citation of cases omitted.]” *Wilson v. United States*, 59 F.(2d) 390, 392 (C.C.A. 3). Emphasis supplied. Wigmore states the same exception to the rule as follows: “Even where the privilege is strictly applicable, the *trial Court may compel disclosure*, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony.” 8 *Wigmore on Evidence* (3rd ed.) sec. 2374. See also, the decision of this Court in *Smith v. United States*, 9 F.(2d) 386, where this Court sustained a ruling that a federal prohibition agent need not reveal the source of information leading to an arrest, but only after it found that “The testimony sought would have had no tendency to prove either the guilt or innocence of defendants” (at 387). Since the evidence sought to be uncovered by appellant in cross-examining regarding the informer’s identity was indispensable to a showing of innocence, the case falls squarely within the exception to the rule and the Court below consequently erred in sustaining the objections to the questions.

There is yet another reason why the Court below erred in refusing to allow appellant to propound questions on cross-examination relating to the informer’s identity. As was pointed out above, the rule forbidding such examination was developed to protect informers from possible reprisals and thus to encourage citizens to bring to the attention of the proper authorities crimes that are about

to be or are being committed. But in the case at bar appellant, long before the trial, knew well enough who the informer was; and since the rule "does not apply when the informer is known" (*Commonwealth v. Congdon*, 265 Mass. 166, 175, 165 N.E. 467, 470 (1928)), the rule has no application to the case at bar. As stated by Wigmore, 8 *Wigmore on Evidence* (3rd ed.) 2374, "If the identity of the informer is *admitted or known*, then there is no reason for pretending concealment, and the privilege of secrecy would be merely an artificial obstacle to proof."

Furthermore, the whole question was an academic one from the beginning; for the Record plainly shows in a number of ways that Berry was the informer. The Court, therefore, should have allowed appellant to pursue his inquiries unimpeded by a rule that no longer had any meaning in this case. That Berry was the informer can be established quickly and readily by comparing page 49 of the Record with pages 65 and 66. On direct examination, Lieberman testified as follows:

"He (appellant) asked me where is the informer, *you know, by his name*, and I told him, 'I will call him, he is upstairs in his room.' I went to the phone. I called him down. * * *" (R. 49).

On cross-examination, he testified regarding the same incident as follows:

"Well, when he came in around eleven o'clock at night he asked me if *Berry* was there. I told him, '*Berry* is not here right now, but he is up in his room. Do you want me to call him? I will call him.' I went to the phone and I called him." (R. 65-66) (Emphasis supplied)

It is clear from the Record, also, that the house at 1678 Forty-fifth Avenue belonged to the informer. At page 72 of the Record, Lieberman referred to the house as "his," i.e., the informer's house, and further testified that the informer had a key to it (R. 68).¹ And, of course, to accentuate the absurdity, appellant knew all along for whom he had asked when he arrived at the hotel that evening and with whom he had dealt throughout. And yet the Government tried to prolong the farce by pretending that it was trying to withhold the identity of the informer.

There is yet another facet of this question that deserves consideration. This case is wholly unlike the ordinary case where an informer is used by the Government to get evidence against a defendant. In the ordinary case, a person unknown to the defendant informs the police that a crime is being committed, or is about to be committed, and the police as a result of such information are able to detect the defendant in the commission of the criminal act and able to testify themselves to all elements necessary to constitute the crime. Here, however, the informer was a party to the very transaction that constituted the crime, and the Government could not, without the testimony of the informer, establish that a crime had been committed. Disregarding Lieberman for the moment, the prosecution could not have established its case without

1. Even assuming for the sake of argument that the Record does not clearly show that Berry was the informer and that the house belonged to him, the Court below nevertheless erred. If the informer and Berry are not the same person then there unquestionably was error in refusing to allow cross-examination regarding Berry since there is no rule of law whatsoever to prevent his identity from being revealed.

the informer. Clearly, if the informer himself had taken the stand to testify that appellant had delivered and sold the can of opium to him, it would have been proper for appellant by cross-examination to show that the informer was a liar and that he had similar cans of opium on his premises. Can the Government, then, stand in a better position because it saw fit to send along with the informer a third person to observe all the transactions between the defendant and the informer and then have the observer, alone, take the stand? Plainly it cannot, for to allow the Government to hide material facts by this obvious device would allow it, by the mere expedient of sending a second agent to observe the first, to keep hidden forever the only facts upon which a defendant could establish his innocence.

The final straw is that Berry was not an informer at all. If anything, he was merely a special agent just as Lieberman was. He apparently was hired and paid by the Government as an officer for the special purpose of detecting appellant in the commission of a crime. The informers about which the cases speak, on the other hand, perform a different function; these people, instead of waiting for the Government to employ them to detect a crime, themselves inform the Government of the criminal act. The Government, therefore, gratuitously labeled Berry an informer; it made no showing or offer whatsoever that Berry was an informer within the meaning of the rule, and, indeed, no such showing can be made on the facts of this case, since Berry acted "by virtue of his office." *Bryant v. Skillman Hardware Co.*, 76 N.J.L. 45, 46, 69 A. 23, 24.

II.

THE PROOF AT THE TRIAL BELOW ESTABLISHED ONLY ONE OFFENSE, IF ANY, AND THE COURT BELOW CONSEQUENTLY ERRED IN SENTENCING APPELLANT TWICE.

The first count of the indictment charges appellant with unlawfully selling, dispensing and distributing "not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium," contrary to the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557 (R. 2). The pertinent provisions of that Act are as follows:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *"

The second count charges "That at the time and place mentioned in the first count * * * defendant fraudulently and knowingly did conceal and facilitate the concealment of said lot of smoking opium * * *," contrary to the Jones-Miller Act, 21 U.S.C. 174, which provides:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in,

knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

At the trial below, the Government relied for proof of its case on the statutory presumptions. It alleged only that immediately prior to the sale appellant had in his possession unstamped smoking opium. The two offenses, therefore, as the Court below properly pointed out, were predicated on "the same transaction and involve(d) the same can of opium" (R. 132). For that reason the Court ordered the sentences to run concurrently (R. 132). But the Court erred nevertheless; for by imposing sentence on each of the two counts it put appellant in jeopardy twice for the same offense, and the defect was not cured by having the two unequal sentences run concurrently.

The Constitutional principle that no one shall be put in jeopardy twice for the same offense "was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange*, 85 U.S. 163, 173, 21 L.Ed. 872, 878. And a criminal is twice punished for the same offense if the evidence necessary to prove either offense will necessarily establish the other also. *Schroeder v. United States*, 7 F.(2d) 60 (C.C.A. 2); *Copperthwaite v. United States*, 37 F.(2d) 846 (C.C.A. 6); *Woods v. United States*, 26 F.(2d)

63 (C.C.A. 8).² Applying this test to the case at bar it is at once apparent that we have here only one offense and not two. The indictment, itself, establishes that the second count occurred "at the time and place mentioned in the first count" and involved the same "lot of smoking opium" (R. 2-3); and the Court below pointed out that the two counts "arose out of the same transaction" (R. 132). And since the convictions were based on the statutory presumptions each of which was satisfied by a showing that defendant had in his possession the same can of opium, not one additional fact needed to be proved under the second count than was already shown under the first count. Indeed, *less* had to be shown under the second count than under the first. The presumption under the statute involved in the first count required a showing that defendant had the drug in his possession without "appropriate tax-paid stamps," while the presumption under the second count required a showing of "possession" alone. Necessarily, then, proof of the offense charged in count one established, without further proof, the offense charged in the second count. Imposition of

2. The test used in determining whether a defendant has been twice *tried* for the same offense is similar. "The test in determining whether more than one offense is charged in an indictment or denounced by statute is whether or not each proposed offense requires proof of some fact which the others do not." *Dimenza v. Johnston*, 130 F.(2d) 465, 466 (C.C.A. 9); cf. *Michener v. Johnston*, 141 F.(2d) 171, footnote 3 (C.C.A. 9). But it is not contended here that appellant was *tried* twice for the same offense. It is conceded that had the proof under the two counts varied sufficiently the indictment could have supported two separate sentences. *Ex parte Thomas*, 55 F. Supp. 30 (E. D. Ky.). But since the proof here did not vary, as shown in the text, the Government did not fulfill its burden of establishing separate offenses and appellant was twice sentenced for the same offense. It is this point only that we urge here.

sentence under both counts, therefore, constituted double punishment in violation of the provisions of the Fifth Amendment to the Constitution of the United States. *Copperthwaite v. United States*, 37 F.(2d) 846 (C.C.A. 6).

The *Copperthwaite* case is squarely in point. There, as here:

“Appellants were convicted under both counts of an indictment, the first of which charged the purchase and sale of unstamped morphine in violation of the Harrison Anti-Narcotic Act (Sec. 692, Tit. 26, U.S. C.A.)³, and the second of which charged, as of the same time and place, the buying and selling of the same amounts of morphine which they knew had been unlawfully imported into the United States, thus constituting an offense under the Narcotic Import Statute (Sec. 174, Tit. 21, U.S.C.A.). They were sentenced to five years imprisonment under the first count and ten years under the second count—the two terms to be concurrent” (at 847).

With respect to the question of double punishment, the Court said:

“* * * The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended—by virtue of the presumption declared in the Import Act—to show unlawful importation and defendants’ knowledge. *In such case the government may punish for either offense, but we think the sup-*

3. Now section 2553 of the same title.

porting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis.” (At 847-848. Emphasis supplied.)⁴

The *Copperthwaite* case has abundant support in the many similar cases decided under the Federal Prohibition Law. See, for example, *Miller v. United States*, 300 Fed. 529 (C.C.A. 6), cert. denied 266 U.S. 624, in which defendant was indicted for and found guilty of, the unlawful possession and the unlawful sale of intoxicating liquor. He was sentenced on each count. “The act of possession relied upon was merely that possession necessarily incidental to the sale which was the basis of the sale count (at 534).” On the question whether defendant was twice punished for the same offense the Court said (at 534):

“* * * While there may be, and commonly is, possession without sale, so that possession for a substantial time, followed by a sale, might be two distinct offenses, in this case the only possession shown was that

4. Nothing in the opinion of this Court in *Parmagini v. United States*, 42 F.(2d) 721, is contrary to the decision in the *Copperthwaite* case, which the *Parmagini* case cites (at 724). The question presented there was whether concealment and sale could be distinct offenses although both occur in connection with a single transaction. Appellant concedes that they can and makes no contention that appellant was *tried* twice for the same offense. See footnote 2, *supra*. It is submitted, however, and the *Copperthwaite* case so holds, that once having gone to trial, the Government cannot rely on a single presumption to prove both parts of its case, and if it does, defendant cannot be sentenced twice. The choice of words in the opinion in the *Parmagini* case is significant. At 724-725, the Court stated clearly that it was considering offenses that “occur *in connection with* a single transaction” (emphasis supplied); the *Copperthwaite* case deals with the situation where both offenses arise out of the *same* transaction.

which temporarily came to Miller for the purpose of completing by delivery the sale which he was making. The same testimony which showed the sale necessarily showed the only possession which is shown at all. It follows * * * that judgment upon the sale count would bar subsequent prosecution for this act of possession, and that there should not be separate and cumulative sentences. * * *

Accord: *Schroeder v. United States*, 7 F.(2d) 60 (C.C.A. 2); *Woods v. United States*, 26 F.(2d) 63 (C.C.A. 8). Compare *Morgan v. United States*, 294 Fed. 82 (C.C.A. 4), holding that where conviction of a defendant on charge of manufacturing moonshine whisky (Count 3) necessarily embraced conviction of the offense of having in his possession the same moonshine whisky (Count 1) and the offense of having in his possession property designed for the manufacture of moonshine whisky (Count 2), conviction on Counts 1 and 2 must be set aside.

In the case at bar (in the language of the cases just cited), "the same testimony which showed the sale necessarily showed the only possession which is shown at all." It follows that there was but one offense and that appellant was sentenced twice contrary to the provisions of the Constitution. Accordingly, the sentence under the second count must be set aside. *Holbrook v. Hunter*, 149 F.(2d) 230 (C.C.A. 10); *Morgan v. United States*, 294 Fed. 82 (C.C.A. 4); *Reynolds v. United States*, 280 Fed. 1 (C.C.A. 6); *Schroeder v. United States*, 7 F.(2d) 60 (C.C.A. 2).

This result, that the sentence under the second count must be set aside, can be based on either of two theories. In the *Holbrook* case, the Circuit Court of Appeals for

the Tenth Circuit, in considering this double-sentence problem, stated that "when the court imposed the sentence * * * on count one, it exhausted its power to sentence, and the sentence on count two was void" (at 232). In the other cases cited, however, the Courts disregarded the order in which the separate counts were set out and held that sentence was to be imposed on the count whose proof included proof of all the other counts. For example, in the *Morgan* case, *supra*, the Circuit Court of Appeals for the Fourth Circuit said (at 84):

"Conviction of the defendant on the charge of manufacturing moonshine whisky, under the facts of this case, necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designed for the manufacture of moonshine whisky, charged in counts 1 and 2 of the same indictment. The act charged as a crime in count 3 included acts charged as crimes in counts 1 and 2. It follows that the sentence under counts 1 and 2 must be set aside, as was properly conceded by the United States attorney. Nothing can be added to the discussions and decisions in *Re Nielson*, 131 U.S. 176, 185, 9 Sup. Ct. 672, 33 L. Ed. 118, *Reynolds v. United States* (C.C.A.) 280 Fed. 1, and *Rossman v. United States* (C.C.A.) 280 Fed. 950."

Under either of these two theories the sentence in this case must be reduced to a prison term of five years. Under the theory of the *Holbrook* case, the sentence of ten years on the second count is void; under the theory of the other cases, since proof of sale of opium by appellant under count one automatically proved possession under count two but proof of possession under count two would not

have proved the sale under count one, the sentence under count two must be set aside.⁵

5. It is interesting to note that in the *Copperthwaite* case, *supra*, where similar sentences were imposed, the Court sustained the longer sentence under the second count. It did so, however, without examination of the problem and without citation of any authority whatever, though similar problems had been previously considered, as was shown in the text. If conjecture be allowed, it is possible that the Court confused the problem here with the general rule, not applicable here, that "in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be revised on error, if any one of the counts is good and warrants the judgment." *Claasen v. United States*, 142 U.S. 146, 12 S.Ct. 170, 35 L.Ed. 966.

The Bank Robbery Act (12 U.S.C.A. sec. 588b) has given rise to many cases involving the problem regarding which of two sentences for the same offense shall be enforced. The cases under that Act are hardly consistent with each other and can furnish support to any view. As stated by the Circuit Court of Appeals for the Second Circuit, the cases "deal in a variety of ways with a variety of sentences." *Miller v. United States*, 147 F.(2d) 372, 374. See, for example, *Holbrook v. United States*, 136 F.(2d) 649 (C.C.A. 8), *Holiday v. United States*, 130 F.(2d) 988 (C.C.A. 8), *Coy v. Johnston*, 136 F.(2d) 818 (C.C.A. 9) and *Wilson v. United States*, 145 F.(2d) 734 (C.C.A. 9). In any event, they are not applicable to our problem here. Those decisions apply to a special case—a statute whose terms set out two separate offenses in form only and not in substance (*Dimenza v. Johnston*, 130 F.(2d) 465 (C.C.A. 9))—and do not apply to a case such as we have here, where two distinct offenses have been set out in the indictment.

CONCLUSION

The District Court erred in refusing to allow appellant to show that the informer was Jerome Berry, that Berry was an opium addict, that the house at 1678 Forty-fifth Avenue belonged to Berry, and all other facts relevant to a showing that the can of opium alleged to have been delivered by appellant to Berry was in fact taken by Berry from his own home and not delivered to him by appellant. The judgment of the Court below, therefore, should be reversed and the case remanded for a new trial.

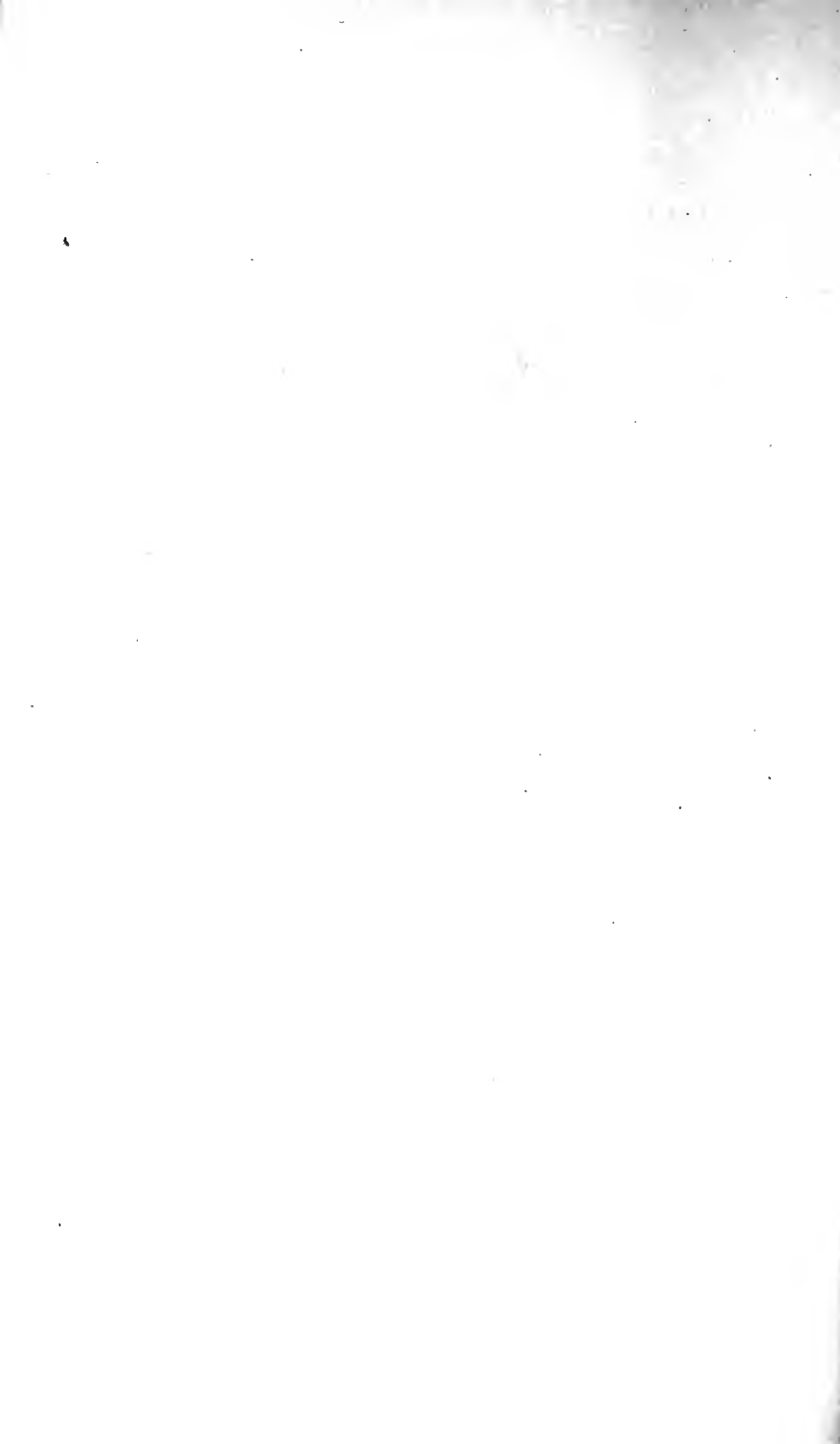
If this Court should find that the trial below was without reversible error, then the District Court erred in imposing sentence on count two of the indictment, and the judgment of the Court below should be modified by striking the judgment on the second count.

Dated: June 20, 1947.

Respectfully submitted,

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Attorney for Appellant.



No. 11,533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEPHEN SORRENTINO, also known as Vincent Sorrentino,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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No. 11,533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEPHEN SORRENTINO, also known as Vincent Sorrentino,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 15-16) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant, after a jury trial, of violations of the Harrison Narcotic Act (26 U.S.C. 2553 and 2557) and the Jones-Miller Act (21 U.S.C. 174). The indictment alleged in the first count that the defendant, on or about the 16th day of August, 1945, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium. In the second count, the indictment alleged that at the time and

place mentioned in the first count, the defendant fraudulently and knowingly did conceal and facilitate the concealment of the same smoking opium, which had been imported into the United States of America contrary to law, as said defendant then and there knew. (Tr. 2-3.)

The Court below had jurisdiction under the provisions of Title 28 U.S.C., Section 41, Subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C., Section 225, Subdivisions (a) and (d).

STATEMENT OF FACTS.

In appellant's "Statement of Facts", argument is confused with narration to such an extent that it is difficult to get a clear picture of what occurred. The facts are simple.

A Special Employee of the Government was introduced to the defendant by an informer. He had several conversations with him concerning narcotics and on one occasion was present when the informer asked the defendant to sell him a can of opium. The defendant agreed to do so and promised to return with it later that night. Upon his return the Special Employee saw the informer and the defendant enter a room. (Tr. 47-53.) A Narcotic Agent, hidden in an adjoining room, overheard the informer say, "Did you bring the can of mud?", and the defendant reply, "No, I didn't bring it; I will later on tonight or tomorrow." The informer then asked the defendant if

he wanted the money and he replied, "No, you can pay me at the time I deliver the stuff." (Tr. 24-25.)

Later the informer, in the presence of the Special Employee, told the defendant to bring the can of opium to a certain house in San Francisco at 5:00 P.M. the following day. (Tr. 52.)

At that time the Narcotic Agent searched the Special Employee and the informer, found that they had no narcotics, and saw them enter the house in question. A short time later he saw the defendant enter and then leave. The Special Employee and the informer emerged and the informer gave the Agent a can of opium. The Special Employee testified that the defendant had delivered the can of opium to the informer in his presence and accepted payment of the purchase price. (Tr. 26-30; 53-55.)

The appellant denied that he had ever discussed narcotics with the Special Employee and, while admitting his visit to the house at the time stated, denied that he had sold narcotics and claimed he had gone there to recover a camera. He denied having the conversation recorded above, which was overheard by the Agent. He claimed that his house had been searched on three occasions by Government officers and that at one of these times he was struck by a Narcotic Agent without provocation. (Tr. 103-116). The Government established that Federal Agents visited the defendant's home and searched it on three occasions: Once to serve a warrant of arrest for receiving stolen Government property, once to search for narcotics, and once to make the arrest

in the instant case. The Narcotic Agent testified that he once pushed the defendant when he became obstreperous. (Tr. 116-122.)

QUESTIONS.

1. Was it an abuse of judicial discretion for the trial Court to prohibit cross-examination which was designed to reveal the identity of the informer?

2. Do Counts One and Two of the indictment state separate and distinct offenses punishable as such?

ARGUMENT.

1. **IT WAS NOT AN ABUSE OF JUDICIAL DISCRETION FOR THE TRIAL COURT TO PROHIBIT CROSS-EXAMINATION WHICH WAS DESIGNED TO REVEAL THE IDENTITY OF THE INFORMER.**

It is a well established principle that information concerning the commission of a crime, given by a citizen to his Government, is a privileged communication and the courts will not compel or permit, without the consent of the Government, the disclosure of the information, the identity of the informer, or the circumstances which provided the informant with his knowledge.

Vogel v. Gruaz, 110 U.S. 311;

In re Quarles & Butler, 158 U.S. 532;

Mitrovich v. United States (C.C.A. 9), 15 F. (2d) 163;

McInes v. United States (C.C.A. 9), 62 F. (2d) 180.

The rule was admirably stated by Justice Blatchford in *Vogel v. Gruaz*, supra, in the following language:

“The principle laid down in that case (*Worthington v. Scribner*, 109 Mass. 487) was that it is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws; and that a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.”

See also:

United States v. Moses, 4 Wash. C.C. 726;

Elrod v. Moss, 278 F. 123;

Arnstein v. United States, 296 F. 946;

Segurola v. United States, 16 F. (2d) 565, affirmed in 275 U.S. 106;

Froelich v. United States, 33 F. (2d) 664;

Goetz v. United States, 39 F. (2d) 903;

Shore v. United States, 49 F. (2d) 522;

Scher v. United States, 95 F. (2d) 64;

United States v. Krulewitch, 145 F. (2d) 76.

Some authorities admit a modification of the rule, and permit the trial Court in its sound discretion, to compel a disclosure in a criminal case when the information is *material* to determine the defendant's innocence.

Underhill's Criminal Evidence, 4th Ed. § 322, p. 634, states:

“* * * when the question arises in a criminal trial and when the information is *material* to determine the defendant's innocence it would seem both reasonable and just that the necessity and desirability of the disclosure and the question whether the public interests would be benefited or would suffer, *should be solely for the judicial discretion upon the circumstances of the case.*” (Emphasis added.)

To the same effect:

Wigmore on Evidence, Vol. 5, § 2374;

Wilson v. United States, 65 F. (2d) 621;

Wilson v. United States, 59 F. (2d) 390;

Smith v. United States (C.C.A. 9), 9 F. (2d) 386.

The propriety of compelling a disclosure rests solely in the discretion of the trial Court and a refusal to compel a disclosure or the exclusion of testimony identifying the informant is not reversible error.

Underhill's Criminal Evidence, 4th Ed. § 332, p. 635, citing *Goetz v. United States* and *Segurola v. United States*, *supra*.

We respectfully submit that in the instant case the disclosure of the identity of the informer or of his place of residence (which would have the same effect) was not material to determine the defendant's innocence.

A Narcotic Agent overheard the defendant state to the informer that he would deliver a can of opium

to him at a later date. (Tr. 24-25.) This same Agent later saw the informer and a Special Employee of the Bureau of Narcotics enter a certain house. He testified that neither of them had narcotics in his possession. Within a few minutes he saw the defendant enter this same house. Later he saw him leave and shortly thereafter met the informer and the Special Employee, at which time the informer gave him a can of opium. (Tr. 25-29.) The Special Employee stated that he had been introduced to the defendant by the informer and that he met him on several occasions (Tr. 48-49); that on one occasion he saw the defendant and the informer go into a basement room of a certain hotel (the record discloses that this was the time and place where the Agent overheard the conversation concerning the delivery of the can of opium) (Tr. 49-50); that he had several conversations with the defendant about narcotics and, on the evening prior to the offense charged in the indictment, overheard the defendant promise the informer that he would sell him a can of opium, and heard the informer tell the defendant to bring it to a certain house at a definite time. (Tr. 52.) (It was at this house and at the time agreed upon that the Agent observed the events which he described above.) He further stated that the defendant came to the house in question at the time agreed upon and delivered the can of opium to the informer in his presence and collected the purchase price.

With these facts before him, the experienced trial Judge refused to permit cross-examination of the wit-

nesses designed to disclose the identity of the informer and the fact that he resided in the premises where the narcotic transaction occurred. It is difficult to imagine what fact "material to the defendant's innocence" appellant hoped to prove by this cross-examination. He claims that his purpose was to "show that at the time that that house was entered there was in that house cans of opium similar to this" (the can of opium in evidence). (Tr. 69.) It is interesting to note that the appellant offered no proof of this fanciful theory, even the defendant did not so testify; furthermore, the Special Employee on further cross-examination denied that he had ever seen any opium in the house of one Jerome Berry, whom the appellant consistently identified with the informer. (Tr. 72.)

We respectfully submit that if disclosure is to be compelled upon every fanciful theory advanced by the defendant, without any reasonable offer to prove the theory, the entire doctrine of privileged communications in such cases must be discarded. It is for this reason that the decision is placed in the discretion of the Court and that its decision, made with all the facts before it, will not be disturbed.

As the Court aptly said in *Wilson v. United States*, 59 F. (2d) 392:

"A trial court must dispose of the cause before it."

In our opinion the trial Judge in this case realized that the appellant's offer of proof was not made in

good faith, that he could not hope to prove by any stretch of the imagination that there was opium in the house before he entered by cross-examination of the Government's witnesses, and that the true reason for the questions was an attempt to implant in the minds of the jury by innuendo and insinuation the idea that the informer was a person of low repute and one who might be in the illegal possession of opium.

The fundamental fallacy of appellant's argument lies in the assumption that such communications are privileged solely for the protection of the informer. On the contrary, the rule is based upon sound reasons of public policy to encourage all citizens to perform their duty in giving the Government information concerning an offense against its laws; and it is only in an exceptional case—where it is clearly made to appear that a grave injustice may be done—that the strict rule is relaxed. There was no evidence of such a danger in the instant case.

Vogel v. Gruaz, supra.

2. COUNTS ONE AND TWO OF THE INDICTMENT STATE SEPARATE AND DISTINCT OFFENSES PUNISHABLE AS SUCH.

This point was definitely settled contra the appellant in *Silverman v. United States*, 59 F. (2d) 636, certiorari denied 287 U.S. 640, which held that sale (under the Harrison Act) and concealment (under the Jones-Miller Act) of narcotics are separate and distinct offenses and that conviction on both counts does not constitute double jeopardy.

Although the offenses charged in Counts One and Two grew out of one transaction, nevertheless two offenses are defined by statute and the proof necessary to sustain each count is different.

Hunt v. Hudspeth, 111 F. (2d) 42.

The same principle of law has been followed in many narcotic cases where two offenses growing out of the same transaction are prosecuted under a *single* statute.

See:

Gargano v. United States (C.C.A. 9), 137 F. (2d) 945;

Gargano v. United States (C.C.A. 9), 140 F. (2d) 118;

Parmagini v. United States (C.C.A. 9), 42 F. (2d) 721, certiorari denied 283 U.S. 818;

Palermo v. United States, 112 F. (2d) 922.

Copperthwaite v. United States, 37 F. (2d) 846, relied upon by appellant, is clearly distinguishable. In that case there was no independent evidence of the purchase of narcotics and the Court properly held that the two inferences (created by the presumptions established by law) which could be drawn from the possession of narcotics, i.e., that it had been unlawfully purchased and that it had been unlawfully imported with the defendant's knowledge, were insufficient to support convictions for both offenses.

In the instant case there was clear evidence of sale and clear evidence of concealment and the evidence required to sustain these separate charges was different.

In any event, the question is moot as the lower Court imposed concurrent sentences and the rule is well established that where a defendant is convicted on several counts of an indictment, the judgment and sentence will be sustained if he was properly convicted under any count which is sufficient in itself to support the judgment.

Whitfield v. Ohio, 297 U.S. 431, 438;

Gantz v. United States, 127 F. (2d) 498, 501;

Holiday v. United States, 130 F. (2d) 988, 990.

The tactics adopted by the appellant at the trial are carried over into his brief before this Court. Many statements of facts which are immaterial—and several of which are unsupported by any testimony in the record—are set forth, purportedly by way of argument, e.g., that the Special Employee was a felon; that this was not the usual type of “informer” case; that the Narcotic Agent did not search the house or arrest and search the defendant when he left it; that the Government had been trying to “pin a crime” on the defendant; that the Agents disliked him; that the Agents did not investigate the rumor that opium was being smoked in the hotel; that the informer was “apparently hired and paid”. Here again the appellant, by insinuation and innuendo,—without a scintilla of proof in the record, and based solely on the unsupported statement of counsel—attempts to create the impression that he was “framed” by the Government Agents.

We respectfully submit that this is a common and obvious defense which is often resorted to in narcotic

cases which are developed by the use of an informer, by defendants who are "grasping at straws" to escape the consequences of their proven acts. In order to give any credence to such a charge in this case we must throw out the testimony of the Narcotic Agent and the Special Employee that each of them heard the defendant, on separate occasions, agree to sell and deliver a can of opium and the testimony of the Special Employee that he actually witnessed the delivery and saw the defendant accept the purchase price.

The fundamental weakness of the appellant's case is perhaps nowhere better stated than in his own brief, at page 15, where he says, "Disregarding Liberman for the moment, * * *." This the jury evidently refused to do.

CONCLUSION.

For the reasons stated we respectfully submit that the decision of the lower Court should be affirmed.

Dated, San Francisco, California,
July 23, 1947.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JAMES T. DAVIS,
Assistant United States Attorney,

Attorneys for Appellee.

No. 11,533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEPHEN SORRENTINO, also known as
Vincent Sorrentino,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the District Court of the United States for the
Northern District of California, Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

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FILED

OCT 3 1947

PAUL P. O'BRIEN,

CLERK



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*To the Honorable Francis A. Garrecht, Presiding
Judge, and to the Honorable Associate Judges of
the United States Circuit Court of Appeals for
the Ninth Circuit:*

Comes now the appellant above-named and respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause and, in support of this petition, represents to the Court as follows:

Appellant, in his brief and at the oral argument, contended that the trial court erred "in refusing to allow appellant to propound questions on cross-exam-

ination relating to the informer and Jerome Berry.” With that contention this Court fully agreed, stating in its opinion that “Information as to this person’s [the informer’s] identity was * * * material to appellant’s defense, and appellant was entitled to a disclosure thereof. Hence the court erred in sustaining the objection.” (Slip opinion, p. 4.) This Court, however, held that the “error was harmless” and for that reason affirmed the judgment of the court below. It is respectfully submitted that this Court erred in that conclusion and that the error was indeed harmful for the following reasons:

- (1) **THE COURT ERRONEOUSLY ASSUMED THAT THE ERROR WAS AS APPARENT TO THE JURY AS IT WAS TO THIS COURT ON EXAMINATION OF THE RECORD.**

This Court, in its opinion, reasoned that, since it was clear from the record that Berry and the informer were one and the same person and that Berry owned the house at 1678 Forty-fifth Avenue, all the evidence material to appellant’s case had been introduced. In support of its conclusion, the Court referred to certain portions of the record and appellant’s brief. The portions of the record selected by the Court to support its conclusions, however, were scattered throughout the record in isolated sentences. At no one place was there a square statement in the record that Berry was the informer or that the house belonged to him. The conclusions reached by the Court and by appellant were reached only after the isolated bits of evidence were culled from the record and carefully pieced together; they were not, and are not, apparent

on the face of the record. Accordingly, there is no reason to suppose that a jury, merely listening to the testimony, was able to arrive at the same conclusions that the attorneys and this Court were able to reach only after an exhaustive study of the printed record.

True, as pointed out in footnote 10 to the opinion of this Court, appellant argued that it was "clear from the record" that Berry was the informer and that the house belonged to him. He did not argue, however, as this Court assumed, that the conclusions were clear to the jury. The argument that the record was plain was made only to show that, as a matter of law, the court below had erred, since the rule that the court applied had no application to the case at bar. It was assumed that, if this Court agreed with appellant, the judgment of the court below would be reversed; for it appeared plain that appellant was prohibited from putting his case simply and plainly before the jury as was his right. As this Court properly pointed out, appellant was entitled to a disclosure of those facts. But he was entitled to more than a mere disclosure; he was entitled to a disclosure in plain and simple form so that the least of the jurors could grasp the significance of the evidence as well as the most alert. The evidence that crept into the record on these points came only indirectly and inadvertently and it is certainly questionable whether any of the jurors grasped the significance of that evidence. For that reason, it is respectfully submitted that the error of the court below was substantial and prejudicial and the judgment, accordingly, should be reversed.

(2) THE EFFECT, IF ANY, OF THE TESTIMONY SUPPORTING APPELLANT'S DEFENSE WAS VITIATED BY THE COURT'S REPEATED RULINGS THAT THE EVIDENCE WAS INADMISSIBLE.

Even assuming that it was clear to the jury from the oral testimony that Berry was the "informer" and that the house in question belonged to him, there is the further question, upon which this Court did not touch, of the effect of the Court's rulings that the testimony was inadmissible. While the effect of those rulings on the minds of the jurors must necessarily be a matter of conjecture, it seems safe to assume that the jurors could only have understood that the testimony was inadmissible and that they should disregard it. In any event, if there is any doubt, it should be resolved in favor of appellant, who, if there is error, will have been wrongfully sentenced to ten years in prison. Furthermore, by the court's rulings, appellant was prevented from making full use of the testimony, whatever there was of it, in his address to the jury. Therefore, even if the testimony was clear, it was vitiated.

(3) APPELLANT'S RIGHT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM WAS UNLAWFULLY CURTAILED.

Even assuming that the evidence on the question of the identity of the "informer" was clear and apparent to the jury, and even assuming further that the effect of that testimony was not vitiated, there still was reversible error because cross-examination was unjustly curtailed. Every time appellant began to em-

bark on the development of his case by cross-examination, he was stopped by the court below. At no time was he allowed to establish his defense in full. The court below placed a blanket prohibition on appellant's questions regarding the identity of the "informer" without reference to the kind of question and the way the information could be used by appellant. See, for example, the record at page 33 where the court below stated, "I will sustain the objection to any question along that line".

This, in itself, was reversible error; for, as this Court has said, "A full cross-examination of a witness upon the subject of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error".

Cossack v. United States, 63 F. (2d) 511, 516-517.

Furthermore, it is now impossible to tell what else appellant could have shown in his defense if full cross-examination were properly allowed. This Court assumed, in its opinion, that all that appellant could have shown was already disclosed by the record. There is no warrant, however, for this assumption; for there is no telling what further line of defense would have been suggested had cross-examination not been unlawfully curtailed. In a sense, cross-examination is exploratory; for attorneys seldom have an opportunity, in criminal cases, to examine adverse witnesses, and even when such opportunity affords



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APPEAL FROM THE DISTRICT COURT OF THE UNITED
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HONORABLE HOWARD C. SPEAKMAN, *Judge*

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

1. STIPULATION RELATIVE TO INSURING ONLY WHILE IN WASHINGTON MAY BE SUBJECT OF WAIVER OR ESTOPPEL.

Appellee argues in its brief that the provision in the policy involved in this case which stipulates

that the insurance covers only within the limits of the State of Washington is one that cannot be waived or be the subject of an estoppel. The fallacy of its argument is that it assumes that a stipulation in a fire insurance policy relative to location of the property is one of the class of stipulations which affects coverage in the sense that it cannot be waived or be the subject of an estoppel.

Every provision in a policy affects coverage or the protection afforded by the policy to a greater or lesser degree. In some cases it has been stated that the coverage of a policy cannot be extended by waiver or estoppel. However, the courts have not clearly defined exactly what is meant by provisions relating to coverage or restrictions on coverage. There are numerous cases where the doctrine of waiver or estoppel has been applied to hold the insurance company liable where under the written provisions of the policy, the insurance would have ceased or become void.

Furthermore, there is a distinction between a case where the facts relied upon as a ground for waiver or estoppel occur prior to or simultaneously with the issuance of the policy and a case where the facts relied on occur sometime subsequent to the issuance of the policy.

We must approach the consideration of this case with a view of determining whether the Washington court has held that a stipulation in a policy of

fire insurance to the effect that the property is protected only while located at a certain place or within a certain area may subsequently be waived or the insurance company estopped to rely on it.

The specific question as to whether a stipulation in a fire policy relating to location can be the subject of waiver or estoppel has been dealt with in at least three cases before the Supreme Court of the State of Washington, and in each of them the Washington Court held that such a stipulation could be the subject of waiver or estoppel.

Two of these cases, namely, *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, have already been dismissed at some length in appellants' opening brief.

In another case not previously referred to in the briefs, namely, *Norris v. China Traders Ins. Co.*, 52 Wash. 554, 100 Pac. 1025, the Washington Supreme Court had under consideration a factual situation bearing many marks of similarity to the instant case. The facts were that the insured had procured through an agent a policy of marine insurance. The policy stipulated that "the insured in accepting this policy hereby binds himself or themselves according to the following agreements and stipulations . . . 4. Not to use any port or places on the East coast of Asia north of Shanghai, nor islands adjacent thereto except ports of Japan . . . B. The

insured vessel to be employed in navigating in Puget Sound, British Columbia and Alaskan waters." Subsequently the vessel owners desired to send the vessel over to Siberia and inquired of the agent if the vessel would be covered by insurance. The agent informed the vessel owner that the vessel would be covered by insurance. The agent, however, testified that while such conversation took place, he stated that there would be a small additional premium depending on the ports the vessel might make. No endorsement or changes were made in the policy. In affirming a judgment allowing recovery for a loss occurring in waters outside those specified in the policy, the Court held that there had been a subsequent parol waiver of the stipulation limiting the territorial coverage of the policy.

Norris v. China Traders Ins. Co., 52 Wash. 554, 100 Pac. 1025.

This case, and those of *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, all involve policies insuring against fire and similar hazards, and a study of them reveals that the Washington Supreme Court is definitely committed to the rule that provisions in such policies relating to location of the property may be subject of parol waiver or estoppel.

Its holding on this point is in accord with what

is stated as a general rule on this subject by text writers.

26 Corpus Juris 281

45 Corpus Juris Secundum 619

3 Couch Cyl. of Ins. Law, Page 2445.

In the case of *Henslin v. United States Fire Insurance Co.*, *supra*, the Court had before it the question of whether the insurance company could be deemed to have waived a stipulation in the policy that the property was insured only while located at a certain place. In discussing this question, the Court said:

"We are not inclined to disagree with the authorities holding that an insurer may be precluded by estoppel from asserting conditions of an insurance policy."

Henslin v. United States Fire Insurance Co.,
152 Wash. 637, 639, 278 Pac. 702.

The Supreme Court of Washington has not changed its rule on this question. Its decision in *Carew, Shaw and Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 Pac. (2d) 689, dealt with a different class of insurance contract, that is, burglary insurance. In that case, location of the valuables, against whose loss by burglary the insurance was issued, was the very essence of the contract. The incident insured against was the theft of money and valuables from a burglar proof chest within a safe. A vital factor in the risk was whether the money was in the chest inside the safe or merely within the safe. Insurance covering the former in-

stance bore a basic rate of \$5.00 per thousand and in the latter instance a rate of \$16.50 per thousand, and this was made known to the insured at the time the insurance was issued. In the instant case there is nothing to suggest that the risk of loss by fire in Washington would be any greater than in some other state. The question of whether a provision in a policy relative to location of property can be waived or the company estopped to rely on it depends on the type of hazard insured against and whether location is something that entered prominently into the calculation of the risk and premium.

Another ground for distinguishing the *Carew, Shaw and Bernasconi* case is that in that case the circumstances relied on for avoiding the effect of a written policy occurred prior to or at about the time of the issuance of the policy. In the instant case the facts relied upon as a ground for waiver or estoppel occurred subsequent to the issuance of the policy. Where the facts relied upon occur subsequent to the issuance of the policy, the appellants submit that there is no arbitrary rule limiting the type of clause or restriction that can be the subject of waiver or estoppel. In two cases referred to above, namely, *Norris v. China Trades Insurance Co.*, 52 Wash. 554, 100 Pac. 1025, and *Henslin V. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, the facts relied on as a ground for waiver or estoppel occurred subsequent to the issuance of the

policy and in each instance the case was disposed of on the theory that there could be a waiver of or an estoppel to rely on a stipulation limiting coverage while the property was in a certain location. On this basis alone, the instant case and the decisions of the Washington Supreme Court on which appellants rely can be distinguished from the *Bernasconi* case.

In the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, 99 F. (2d) 333, 108 F. (2d) 713, the principal fact relied upon for relief, against the stipulation in the policy that the company insured the building "while occupied only for dwelling house purposes," was that the agent Langer "had known for several years that the property in question had not been used exclusively as a dwelling place, but that it was intended to be and was actually used as an inn, hotel and tavern." The knowledge of the agent relied upon as a ground for avoiding the effect of the stipulation insuring only while used as a dwelling house was knowledge he had at the time he issued the policy. If that knowledge, coupled with the fact that a policy was issued, had any implication, it was not that the insurance company was waiving the stipulation relative to use. The implication, if any, flowing from those facts was that the policy issued did not reflect the preliminary agreement of the parties and reformation was the only appropriate remedy.

It also appears from the concluding paragraph of the second opinion, 108 F. (2d) 713, that the rate on the building if used as a tavern was about five times the rate if used as a dwelling. The stipulation about the use of the building was obviously one that had an important bearing on the risk and the premium. One cannot disagree with the court's conclusion that in order to recover in that case plaintiffs were obliged to prove facts entitling them to reformation.

In the instant case there is nothing to suggest that the risk would be any greater outside the State of Washington than within the State. The facts relied upon as a basis for waiver or estoppel occurred subsequent to the issuance of the policy. Appellee's agents who signed the policy, more than any other person, were chargeable with knowledge of the provisions of the policy. After it had been brought to their attention that the insured's property had been moved outside the state, the appellee's agents issued a loss payable clause, requested payment of a balance on a premium and wrote other letters, the effect of which was to lead the appellants to believe that they were protected.

Having in mind the facts in the instant case, it would be difficult to find a more appropriate statement of the applicable rule than that contained in the following quotation from a decision of the Washington Supreme Court:

“The rule upon the subject is that, if an insurance company, having knowledge of such facts as vitiate the policy, nevertheless enters into negotiations or transactions by which it recognizes or treats the policy as still in force, or by its acts, declarations and dealings leads the insured to regard himself as being protected by the policy, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of the forfeiture and estops the insured from relying thereon as a defense to an action on the policy.”

Reynolds v. Travelers Ins. Co., 176 Wash. 36, 46, 28 Pac. (2) 310.

After careful study of many cases on this question, counsel for appellants believe that the various cases cited to this court, can be reconciled and the following is submitted as a correct statement of applicable principles:

(1) Where the provision or stipulation is one which enters prominently into the calculation of the risk or involves a description of the property, recovery, notwithstanding violation of the provision or stipulation, where based on knowledge or other facts in existence prior to or concurrent with the issuance of the policy, can be had only upon the theory of reformation and upon evidence sufficiently clear and convincing to entitle one to reformation.

(2) Where the provision or stipulation is one which does not enter prominently into the calculation of the risk, recovery, notwithstanding violation of the provision or stipulation, where based on

insurance agent's knowledge or other facts in existence prior to or concurrent with the issuance of the policy, can be had on the theory of waiver or estoppel. Examples of stipulations or provisions coming within this rule are provisions prohibiting other insurance, removal of property from the area described in the policy, encumbering of property, etc.

(3) Where the effect of a stipulation or provision in a fire policy is sought to be avoided based on facts or transactions occurring subsequent to the issuance of the policy, there is no arbitrary limit as to what kind or class of stipulation can be the subject of waiver or estoppel. It is simply a question of whether the insurance company or its agent by its acts or conduct has led the insured to believe that he was protected against a particular hazard, when in fact he was not protected under the written provision of the policy, and thus has waived the provision or is estopped to rely upon it. In such a situation the question of whether the insured knew of the terms of the policy, goes only to the question of whether the insured relied on or was justified in relying on the acts of the insurance company or its agent.

Appellants respectfully submit that under these principles it is entitled to recover on the theory of waiver or estoppel.

2. EVIDENCE WAS SUFFICIENT TO WARRANT REFORMATION

In support of its contention that appellant Van Meter's testimony was not sufficiently clear and convincing to justify reformation, appellee refers to certain of his testimony appearing at pages 117 and 118 of the Transcript. Appellant Van Meter had previously testified that a marine type of policy had been explained to him which was good any place and it was this type of policy Esfeld agreed to have issued. (Tr. 82 and 83). When questioned by the Court, he reiterated these statements. (Tr. 116 and 117). The Court also inquired of the witness, as to whether anything was said about covering outside the State of Washington, and the witness replied that : "I don't think it was discussed either way." (Tr. 117).

Inasmuch as the type of policy agreed upon contemplated that it would have no territorial limitations, obviously there was no occasion for discussing whether it covered outside the State of Washington or only within the State. Once it had been explained to Van Meter that the policy was good any place, why should he ask whether it was good outside the State of Washington, or why should Esfeld make any statement along that line? The parties were obviously not thinking in terms of State boundaries. That was an element injected into the matter by appellee when it wrote up the policy.

The fact is that Esfeld agreed to have a policy issued insuring Van Meter against fire and other hazards. The property was movable and Van Meter had previously discussed with Esfeld the possibilities of his moving outside the State (Tr. 86, 118). Esfeld having agreed to procure a policy of fire insurance, the issuance of a policy of insurance which insured the property only while in Washington was not in compliance with that agreement.

Van Meter's statement that nothing was said either way about coverage outside the State of Washington, when considered in the light of his other testimony that the form of policy to be issued was one that protected him any place, brings out that there was no agreement that the broad territorial coverage of the form of policy agreed upon was to be limited by the boundaries of any particular state.

Aside from the fact that Van Meter did not agree to any provision that he was only to have protection while the property was in Washington, it appears that Morton Pinch, the agent who signed the policy, was unaware of the presence of this provision in the policy (Tr. 139, 140). The provision that the insurance covers only while within the limits of the State of Washington was a condition limiting the general scope of the policy. How can it be said that it reflected the preliminary agreement of the parties when nothing was said about any such limi-

tation or condition and neither was aware of its presence in the policy. Van Meter understood that a policy good any place was to be issued, and the agent of the appellee, having knowledge of the printed provisions and no awareness of the typewritten clause, obviously intended to issue a policy that was good anywhere in the United States. The later acts of both parties attest unequivocally to the fact that they both assumed and understood that there was no condition in the policy limiting the broad territorial coverage contemplated by the printed form of the policy.

3. APPELLANTS' FAILURE TO READ POLICY DOES NOT PRECLUDE RIGHT TO REFORMATION.

Appellee argues rather insistently that appellants were chargeable with knowledge of the terms of the policy and that Van Meter, not having availed himself of an opportunity to examine the policy, was guilty of negligence which would prevent reformation. Here the appellee again relies on the case of *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 Pac. (2) 649.

Let us examine closely that case with this point in mind. In the first place the statement that the insured was chargeable with knowledge of the terms of the policy so as to preclude reformation was not necessary to the decision of the case. In its opinion

the Court said: "The appellant has not shown by clear, cogent and convincing evidence that there was a mistake or fraud in the issuance of the policy requiring reformation of the contract." (189 Wash. 339). Having found that the appellant was not entitled to reformation, the later statement in the opinion that his negligence and failure to read the policy would have precluded reformation in any event and was not necessary to the decision. Furthermore, in that case the facts recited in the opinion show that Lambuth, an agent of the insured who handled the insured's other insurance business, had the policy in his possession. The Court points out that "the most casual examination by Lambuth who was appellant's (insured's) agent and who discussed the policy and coverages with appellant's vice-president would have revealed to their agent the coverage afforded by the policy." The Court goes on to point out that "On October 10, 1934, Lambuth sent the policy to Shaw (vice-president of the insured) who manually handled the policy and maintained it in his possession." (189 Wash. 340). Furthermore, it appears from the statement of facts in the opinion that the basic rate on the insurance against burglary from within the chest was \$5.00 per thousand, while the rate on insurance against theft from the safe itself, which was only fireproof, would take a basic rate of \$16.50. The difference in these rates was fully explained to the insured.

How different is the situation here where the insured never saw the policy. Furthermore, a casual reading of the policy in the instant case would not have disclosed that the property was insured only while in Washington. Much more prominent is the provision that "this insurance covers only within the limits of the United States and Canada."

In support of its statement that it was the insured's duty to read the policy, the Washington Court in the *Bernasconi* case cites several earlier Washington decisions. A reading of these other cases shows that in each instance, except one, the statement was made with reference to a situation where the parties seeking to avoid the effect of the provision in question had signed the instrument. In one case, *McCann v. Reeder*, 178 Wash. 126, 34 Pac. (2) 461, the insured and his agent had received and had taken possession of the policy and neither denied that they had read the policy nor did they deny that they were aware of the false warranties therein. Two of the cases cited, namely, *Hayes v. Automobile Insurance Company*, 126 Wash. 487, 218 Pac. 252, and *Perry v. Continental Insurance Company*, 178 Wash. 24, 33 Pac. (2) 661, involved fire insurance policies. In those two cases it appears that the insured was trying to avoid the effect of false representations contained in an application for insurance signed by the insured. As a general rule it can be said that a person is chargeable with

knowledge of the contents of an instrument he signs. However, to extend the application of that rule to a situation where the insured never signed an application and never saw the policy, and the insurance company's agent knew the insured never saw the policy, would in effect be to hold that in no case would reformation of an insurance policy be possible. That is not the law in Washington or in any other state.

The Washington Court has held that the rules governing the reformation of written instruments are applicable to the reformation of an insurance policy. *Bjorkland v. Continental Casualty Company*, 161 Wash. 340, 297 Pac. 155.

It has held that a party's failure to discover a mistake in a written instrument does not preclude reformation. *Silbon v. Pacific Brewing & Malting Company*, 72 Wash. 13, 129 Pac. 581.

It has also aptly pointed out that if the negligence of the party was to defeat reformation there would be few contracts reformed. It has said:

"The appellants argue that the mistake was the result of the respondent's negligence and that he cannot have his deed reformed. If this were true, there would be few contracts reformed. Mistakes in written instruments are usually due to negligence on the part of one or both of the parties where there is no fraud. This Court has uniformly taken the view that conveyances in real property may be reformed so as to effectuate the actual intention of the parties where there has been a material and mutual mistake

and where that mistake has been shown by clear and convincing evidence.”

Carlson v. Druse, 79 Wash. 542, 548, 140 Pac. 570.

The answer to the question of whether knowledge or means of knowledg precludes reformation is that each case must be considered in the light of its own facts. This is well illustrated by the two decisions of this Court in *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2d 333, 108 Fed. 2d 713. When that case was first before this Court, it appeared from the statement of facts in the opinion that the insurance policy had been issued on about August 19, 1935, and that it had been left with the insured's mortgagee. The fire did not occur until September 12, 1936. It was obvious that the insured would have had an opportunity within that period to have examined the policy if he had been necessarily chargeable with knowledg of the terms of the policy. However, this court, on the basis of the facts then shown by the record, said: “Under this evidence we see no reason why reformation should not be granted.” (99 Fed. 2d 335).

When this case was before this Court the second time, it appeared from the facts that had been developed, that one of the insured who ordered the insurance had actually seen the policy and had had an opportunity to examine it and had noted one or two exceptions to the policy. Likewise, it appears that he was cognizant of the material difference in

the rate. With these facts before it, this Court held that reformation was not permissible. (108 Fed. 713). Thus, in its two decisions in this case, this Court has recognized the difference between a situation where an insured has examined the policy, or has had the policy in his possession, and a situation where the insured never saw the policy or never had it in his possession.

The Court's attention is again invited to the very respectable list of authorities cited on pages 20 and 21 of appellants' opening brief holding that mere failure to read a fire policy in ones possession is not such negligence as will preclude reformation.

In the instant case there was an agreement to issue a policy with broad territorial coverage. There was no agreement that the insurance was to be effective only while the property was in Washington. The subsequent act of both parties attest to the fact that that was the understanding, and, finally, in view of the circumstances, it cannot be said that the insured's failure to examine the policy should preclude his right to reformation.

Respectfully submitted,

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No. ~~9775~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY

(a corporation),

Appellant,

VS.

IRENE ZEHNLE and JERRY ZEHNLE, a
Minor, by his Guardian Ad Litem,
IRENE ZEHNLE,

Appellees.

BRIEF FOR APPELLANT.

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No. 9775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY

(a corporation),

Appellant,

vs.

IRENE ZEHNLE and JERRY ZEHNLE, a

Minor, by his Guardian Ad Litem,

IRENE ZEHNLE,

Appellees.

BRIEF FOR APPELLANT.

I.

JURISDICTION.

This is an appeal from a judgment made and entered by the United States District Court, in and for the Northern Division of the Northern District of California, upon a verdict of a jury against the appellant (defendant in the lower Court) in favor of Jerry Zehnle, a minor, in the sum of twenty thousand dollars (\$20,000.00). The action was brought to recover an alleged pecuniary loss suffered by Jerry Zehnle, a minor, because of the death of his father,

Joseph John Zehnle, whose death occurred while a passenger on appellant's passenger train, No. First 21, when the rear end of said train was struck by appellant's train No. Second 21, in the vicinity of Bagley, Utah.

This action was originally commenced in said United States District Court by Irene Zehnle (as the alleged widow of Joseph John Zehnle) and Jerry Zehnle, a minor (as the son of Joseph John Zehnle) by his guardian ad litem, Irene Zehnle, residents of the State of California, against the appellant, a resident of the State of Kentucky. There was, therefore, a controversy between citizens of different states. (R. 2.) Irene Zehnle had obtained a decree of divorce from said Joseph John Zehnle on November 27, 1944, prior to the commencement of this case. She thereafter filed her voluntary dismissal of her alleged cause of action against said defendant. (R. 4.) The first amended complaint was filed, setting forth a single alleged cause of action in favor of Jerry Zehnle, a minor (R. 5), a resident of the State of California. (R. 6 and 8.)

The jurisdiction of said United States District Court was founded upon Judicial Code, Sec. 24 (1b) amended, Title 28, United States Code Annotated, Sec. 225 (a). The jurisdiction of the Circuit Court of Appeals to review the judgment on appeal from said District Court is based upon Judicial Code Sec. 128 (a), Title 28, United States Code Annotated Sec. 225 (a).

II.

STATEMENT OF THE CASE.

(a) History of the case.

This action was tried before a jury, based upon the issue made by the first amended complaint, and the appellant's answer thereto. The jury rendered its verdict in favor of the appellee (plaintiff below) and assessed damages against the appellant (defendant below) in the sum of twenty thousand dollars (\$20,000.00) (R. 19), and upon such verdict a judgment was entered against the appellant in said amount (R. 20). Within the time allowed by law the appellant filed its motion for a new trial (R. 21). On May 17, 1946, said United States District Court, through Honorable Martin I. Welsh, made and filed its opinion and order that defendant's motion for a new trial be granted, and the verdict be vacated for the causes therein set forth materially affecting the substantial rights of the defendant (R. 24-37).

On June 11, 1946, through Honorable Judge Martin I. Welsh, said Court made and filed its order vacating the order granting a new trial, on the ground that the order granting a new trial on May 17, 1946, had been made and entered through inadvertence. It was further ordered that said motion for a new trial be restored to the calendar for further hearing. After further hearing said District Court, through Honorable Judge George B. Harris, made its order denying defendant's motion for a new trial (R. 38). Thereafter and at the time and in the manner required by law, the appellant filed this appeal.

(b) **Statement of facts.**

The trial of the issue of the alleged negligence of appellant was had upon evidence adduced pursuant to the written stipulation of the parties filed in said cause (R. 9-18). The complaint alleges, and the answer admits that Joseph John Zehnle was a passenger on December 31, 1944, on the appellant's westbound, first class, passenger train, known as train No. First 21. Said stipulation, in part, sets forth that said train departed westward from Ogden, Utah, at 4:38 A.M., and proceeded westward on the Southern Pacific's main line track, to a point 18.82 miles west of Ogden, Utah, and while moving at an estimated speed of eight miles an hour, it was struck in the rear and from the rear by Southern Pacific Company's train No. Second 21.

Southern Pacific train No. Second 21, a westbound, first-class mail-express-baggage train, departed westward from Ogden, Utah, at 4:50 A.M., on said day, on the same westbound track, and proceeded westward along said track to said point west of Bagley, Utah, where it struck the rear end of train No. First 21. The engineer of train No. Second 21, was dead before there was an opportunity to obtain any statement from him or testimony from him in respect to the operation of train No. Second 21. It was further stipulated that the only claim of negligence made by plaintiff is in respect to the conduct of the engine crews and train crews of trains Nos. First 21, and Second 21, after said trains left Ogden, Utah.

Since the appellant is not seeking on this appeal a reversal of the judgment upon the issue of negligence, as is more specifically shown by Statement of Points under Rule 75 (d) (R. 50), and the Statement of Points under Subd. D of Rule 19 of this Court (R. 109), it is not necessary to state herein the specific evidence in regard to the accident. Accordingly, this statement of facts is limited to the evidence concerning the points set forth in said statements.

Joseph John Zehnle and Irene Zehnle were married in Redwood Falls, Minnesota, on September 3, 1941 (R. 56), and following their marriage resided together on the farm of Mr. Zehnle's parents in Minnesota for a period of two months, or until some time in November (R. 60, 61, 70). In November, 1941, Mrs. Zehnle returned to Sacramento. Zehnle remained on the farm in Minnesota. During Mrs. Zehnle's sojourn in Sacramento, California, Jerry Zehnle was born on July 18, 1942 (R. 56). Mrs. Zehnle and her child remained in Sacramento until the child was one year old, when she rejoined her husband in Minnesota. The family lived together on said farm for eight months (R. 61, 71). Mrs. Zehnle and her child returned to Sacramento and remained there at all times thereafter excepting for a brief period when Mrs. Zehnle resided in the State of Nevada, and procured a decree of divorce from Zehnle which was entered on November 27, 1944. It thus appears that the married life of these parties extended over a period of three years, two months and twenty-one days, and during that period they were together for a period of only ten

months, eight of which were after the birth of the child. They were separated for two years, four months and twenty-one days.

During this period of separation Mrs. Zehnle testified that her husband contributed to her support, and the support of her son, in varying amounts from a low of twenty dollars (\$20.00) per month to a high of fifty dollars (\$50.00) per month (R. 61, 62); that it was entirely inadequate for their support, and that she supplemented the same by working (R. 70). She further testified that she did not know what her husband's earnings were during the time he was working on his parents' farm (R. 71).

In April, 1944, Zehnle entered the Merchant Marine (R. 59), and his total earnings or wages for eight months of that year amounted to nine hundred ninety-four and 81/100 dollars (\$994.81), an average of one hundred twenty-four and 35/100 dollars (\$124.35) per month (R. 59). Despite her testimony as to his general contributions, the evidence specifically shows through a series of letters (R. 79 to 87) that the only money Zehnle sent while in the Merchant Marine was one hundred dollars (\$100.00). This is shown by a letter dated October 10, 1944, wherein it is stated:

"I got paid today so I thought I would send you some money for Xmas, in case I don't get back in time. 50 is for you, Irene, and 50 is for Jerry * * * I sent 200 dollars home for my dad to keep for me until I get there." (R. 81).

A letter of November 10, 1944, shows that the decedent "bought Jerry a 25 dollar bond last trip"

(R. 83). In other words, these letters (which we must assume to be all that he wrote, because if she had received more, she would have introduced them) show that during the period of eight months he contributed only one hundred (\$100.00) dollars to the support of his family. The decedent's utter failure and neglect to support his wife and child admittedly (R. 74) resulted in Irene Zehnle filing a complaint for divorce in the Second Judicial Court of the State of Nevada, in and for the County of Washoe. Her verified complaint for a decree of divorce contained the following allegations:

“Paragraph IV: That there is no community property belonging to plaintiff and defendant.

“V. That since the marriage of plaintiff and defendant as aforesaid, said defendant, for more than one year immediately preceding the commencement of this action has failed, refused and neglected, and still fails, neglects and refuses to provide plaintiff with the common necessities of life, and that such failure and neglect is not the result of sickness or poverty on the part of defendant which he could not avoid by ordinary industry” (R. 72).

The prayer of said complaint prayed for the bonds of matrimony to be forever dissolved, and that the plaintiff be awarded the sole care, custody and control of the minor child of said parties.

Based upon said complaint and evidence adduced in support thereof, the said Nevada Court, on the 27th day of November, 1944, entered its decree of divorce, which in part provided:

“That she is entitled to a decree of divorce as prayed for in her complaint on the ground of defendant’s failure and neglect to provide plaintiff with the common necessities of life for more than one year immediately preceding the commencement of this action.

“Decree: Now, therefore, it is ordered, adjudged and decreed, that the bonds of matrimony and contract of marriage now existing between plaintiff, Irene Zehnle, and defendant, Joseph John Zehnle, be, and the same are hereby absolutely and forever dissolved and the parties hereto are restored to the status of unmarried and single persons.

“It is further ordered that plaintiff be, and is hereby awarded the sole care, custody, and control of Jerry Zehnle, the minor child of said parties.

“Done in open court this 27th day of November, 1944” (R. 74).

It will be noted by said decree that the sole care, custody and control of Jerry Zehnle was awarded to his mother, and that said decree made no provision requiring Zehnle to pay any sum whatsoever for the support of said minor child. There is no evidence in the record that after the death of Zehnle, the mother was unable to support her child. On the contrary she testified that she was able to support herself and child by working and from the insurance money she was receiving (R. 63). (The insurance was on the life of Joseph John Zehnle.)

The foregoing is all of the evidence introduced to prove what pecuniary loss, if any, was suffered by Jerry Zehnle by reason of the death of his father. There was some evidence that Zehnle had been planning and was ambitious for the child's future, and that he had the ordinary paternal attitude of a father for his child (R. 65 and 66).

III.

SPECIFICATIONS OF ERROR.

1. A verdict in the sum of twenty thousand dollars (\$20,000.00) is against law, and the evidence is insufficient to justify the verdict, in that the evidence adduced at the trial failed to prove any pecuniary loss sustained by the plaintiff and proximately caused by the wrong complained of, as the record is devoid of any deprivation of anything to which the plaintiff would have been legally entitled, if his father had lived, and devoid of any deprivation of benefits which the plaintiff might reasonably have expected he would receive from the deceased had his life not been taken, in this

(a) In view of the fact that the plaintiff and the decedent, pursuant to the decree of divorce, would be obliged to live apart, nothing could be awarded to the plaintiff for the loss of the society, care, and comfort of and protection and education by the deceased;

(b) Under the evidence the plaintiff would not have been legally entitled to support from his father,

if he had lived, under the laws of the state of residence of the plaintiff, and hence no recoverable loss was suffered by his father's death.

2. The verdict in the sum of twenty thousand dollars (\$20,000.00) is substantially disproportionate to the loss, if any, sustained by the plaintiff.

3. Excessive damages in favor of the plaintiff and against the defendant appearing to have been given under the influence of passion, prejudice and/or sympathy.

4. Errors in law occurring at the trial by rulings which sustained plaintiff's objection to questions propounded to Irene Zehnle relating to her verification of the original complaint, wherein she swore that she was the widow of Joseph John Zehnle, decedent. The questions were propounded for the purpose of impeaching the witness as to her truth, honesty and integrity.

IV.

NO PROOF THAT THE PLAINTIFF SUFFERED A PECUNIARY LOSS BY OR THROUGH THE DEATH OF HIS FATHER.

In actions for death, either under Section 377 of the Code of Civil Procedure of the State of California, or under Section 6505 of the Compiled Laws of the State of Utah (1917) (the state in which the accident occurred), the limit of recovery for an heir of a deceased person is the pecuniary loss sustained by such heir, and proximately caused by the wrong complained of. Pecuniary loss may be either a loss arising from

the deprivation of something to which plaintiff would have been legally entitled, if his father had lived or a loss arising from the deprivation of benefits which from all circumstances of the particular case it would be reasonably supposed the plaintiff would have received from the deceased, had his life not been taken.

Brown v. Beck, 63 Cal. App. 686, at 696;

Sneed v. Marysville Gas etc. Co., 149 Cal. 704 at 710;

Parmley v. Pleasant Valley Coal Co. (Sup. Court of Utah), 228 Pac. 557. on page 558 (it is shown that Section 6505 was originally adopted from Section 377 of the Code of Civil Procedure of the State of California in 1884).

Johnson v. The Western Air Express Corporation, 45 Cal. App. (2d) 614 at 622, clearly states the rule as follows:

“The measure of damages in such case is what the heirs were receiving at the time of the death of the deceased and what such heirs would have received had decedent lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation.”

Therefore, it is the pecuniary loss to an heir, by reason of the death, that is recoverable and that only. It follows that there can be no substantial recovery by an heir who has not suffered substantial pecuniary injury. In the absence of proof tending to show an actual damage or a probable loss with reasonable certainty resulting to plaintiff from the death, the jury

should be instructed that the heir's recovery must be limited to nominal damages. Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for estimating damages resulting from a death. (*Cinocchio v. San Francisco*, 149 Cal. 159 at 167.)

As shown above, pecuniary loss normally suffered by a minor child, by reason of the death of his father, is classified or segregated into two elements:

1. The deprivation of something to which plaintiff would have been legally entitled if his father had lived, that is, loss of a legally enforceable right of support.

2. Benefits which it could be reasonably expected plaintiff would have received if the decedent had lived, to-wit, care, society, comfort, protection and education.

It will first be shown, as the District Court instructed the jury, no damage could be found based upon any claim for loss of care, society, comfort and protection, and secondly, that there is utterly no proof of any substantial loss of support, because the decedent was not legally obliged to support his son.

(a) **No proof of loss of care, society, comfort and protection.**

As shown heretofore, the decree of divorce obtained by Irene Zehnle from her husband, Joseph John Zehnle, in part provided:

“It is further ordered that plaintiff be, and is hereby awarded the sole care, custody and con-

trol of Jerry Zehnle, the minor child of said parties.” (R. 74).

It will be noted that under said decree, there was no legal right given to Zehnle to visit his son at any time, but as stated in the decree, Irene Zehnle had the *sole* care, custody and control of said minor. Under such decree said minor child would not be a member of the decedent’s household, nor could he reside with his father, if his father had lived, nor could the father have the right even to see the child without the mother’s consent.

It is evident under the circumstances, that Zehnle (a resident of the State of Minnesota) would have had no opportunity to bestow upon his son (a resident of the State of California) his care, custody, comfort or protection. Under such circumstances the plaintiff cannot claim a pecuniary loss by being deprived of such society, comfort, care or protection which he would not have received, if his father had lived. Such is the holding of the California Courts:

In *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487, the facts were that the decedent and his wife had been living separate and apart, although not legally separated or divorced. In regard to the wife’s right to recover for the loss of care, society, comfort and protection of the deceased, the Court stated:

“In view of the fact that the plaintiff and deceased had been living apart, nothing could have been awarded to the plaintiff for the loss of the society, comfort and protection of the deceased.

The amount awarded is solely attributable, therefore, to the loss by the death of the husband of the legally enforceable right of support against him."

In *Sanfilippo v. Lesser*, 59 Cal. App. 86, there was involved an action for the death of a mother in which the husband and a minor daughter, seventeen (17) years old, were plaintiffs. The Court, in discussing the question of the recovery of pecuniary loss for the deprivation of society, comfort and protection of the deceased, said:

"It appears therefrom that there is no evidence that Philip Sanfilippo, the husband, was living with the deceased at the time of her death or that her society was of a pecuniary value to him or that she rendered any services to him * * * as to the minor child seventeen (17) years of age, there is also no evidence that she resided with her mother and not the faintest suggestion that she suffered any pecuniary loss by her death. It is always to be borne in mind that no recovery can be had for grief, sorrow, and mental suffering of the heirs of the deceased."

The Court then, on page 91, recognized that there may be a pecuniary loss to the wife or child from the death of the husband arising from the deprivation of the society, comfort and protection of the deceased, and in this regard the Court stated:

"But this is not a universal right existing in every case. It is allowable only where the 'circumstances' showing a reasonable probability that the society, comfort and protection afforded

to the surviving parent or wife was of such a character that it would be of a pecuniary advantage to the parent or wife, and that a deprivation thereof would entail a pecuniary loss to them."

In *Cossi v. Southern Pacific Company*, 110 Cal. App. 110, there was involved an action by the father for the death of his ten (10) year old son. [The mother and the father were separated. The mother and her three children, including the deceased, were living apart from the husband. The Court, in denying pecuniary loss to the husband for the death of his son, stated:

"It was incumbent upon appellant to prove by a preponderance of the evidence that pecuniary injury was reasonably certain to be suffered by him from the death of his child. The jury may well have concluded from the facts before them that father and son were so little interested in one another that there was no reasonable certainty that the continued life of the son would be of any pecuniary value to the father."

Such is also the holding of the Utah Courts, as shown in the case of *Burbidge v. Utah Light & Traction Co.*, 196 Pac. 506. The decedent had lived separately and apart from his three minor children for about eighteen months prior to his death, and during that period not only did he not support his children, but had not associated with them. The trial Court gave an instruction that there was no evidence of loss of society and companionship, and hence no recovery

of damages could be had on that ground. The Supreme Court on appeal, in regard to the subject (page 558) said:

“The court instructed the jury that the plaintiff was not entitled to recover for loss of companionship and society of the deceased. No complaint is made of that instruction. We assume that none could have been made under the circumstances shown by the testimony.”

In instructing the jury in the case at bar, the District Court recognized the law hereinabove stated and instructed the jury as follows:

“If you find that in all probability Jerry Zehnle would continue during his minority to live apart from his father (if the latter had lived), then I instruct you that nothing can be awarded to plaintiff for the loss of society, comfort and protection of the deceased, and the amount of your award, if any, must be solely attributable to the loss of the legal enforceable right of support, if any there may be.”

The evidence shows that at the time of Zehnle's death the decree was in full force and effect, and that he had not lived with his wife and child for approximately a year prior to the divorce. Hence there was no evidence of any kind indicating any possibility of the remarriage or the change of custody of Jerry Zehnle from his mother to his father. Under such circumstances existing at the time of death, there was no basis for the recovery of loss of care, comfort, society and protection. Therefore, there remains for

consideration one other element of pecuniary loss, that is, the loss of legally enforceable right of support.

(b) No proof of loss of support.

The question under this heading is whether or not Jerry Zehnle suffered a loss of a legally enforceable right of support against his father, by reason of the latter's death.

As stated heretofore by the decree of divorce entered on November 27, 1944, the plaintiff therein, Irene Zehnle, was awarded the sole care, custody and control of the minor child. The decree made no provision requiring the defendant therein to pay any sum whatsoever for the support of his said minor child.

In view of the fact that the complaint alleges, and the answer admits that the plaintiff was a resident of the State of California, the question of whether or not Zehnle was obligated to support his said minor child would depend upon California law, the law of the state of the residence of said minor.

Section 196 of the Civil Code of the State of California, provides:

"The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

Section 207 of the Civil Code provides:

"If the parent neglects to provide articles necessary for said child who is under his charge, according to his circumstances, a third person

may in good faith supply such necessities, and recover the reasonable value thereof from the parent.”

Under said substantive law of the State of California, and because the decree of divorce awarded the sole custody to the mother without any provision for support of the child, the father was released from all legal obligation to support his child, nor could the father have been held liable for necessities furnished said child by third persons.

Earlier cases of the Appellate Courts of the State of California held without any qualification that, the father of a minor child was under no obligation to provide for his child any support or education beyond that which might be directed by the Court which granted the divorce, either in its decree or by subsequent modifications. Such a case is *Lewis v. Lewis*, 174 Cal. 336, where there was involved an action by a minor daughter of the defendant to compel her father to contribute to her support and education during minority. The mother had obtained a final decree of divorce from the defendant, which awarded the exclusive custody and control of the plaintiff to the mother and also provided that the defendant should pay to plaintiff for the maintenance and support of herself and minor child, the sum of ten hundred fifty dollars (\$1,050.00) in monthly installments. These payments had been made in full before the commencement of the present action. It was alleged and found that the plaintiff (the minor) was without means and

not able, by reason of her tender age, to maintain, support and educate herself; that her mother did not have sufficient means to enable her to provide adequately for the plaintiff, and the defendant was well able to provide for her. Judgment was given in favor of the plaintiff, requiring the defendant to pay a given sum for such support. Upon appeal, the Court, in reversing the lower Court, referred to Section 196 of the Civil Code and then stated:

“The decisions of this Court are clear to the effect that when there has been a decree of divorce and such decree vests the custody of the minor child in the mother, the father is under no obligation to provide for such children any support or education beyond that which may be directed by the Court which granted the divorce either in its decree or by subsequent modifications.”

The Court then cited the earlier cases, to-wit: *Ex parte Miller*, 109 Cal. 643 at 648; *Selfridge v. Paxton*, 145 Cal. 713 at 716, and in reversing the judgment of the lower Court, stated (page 341):

“The authorities cited leave no avenue of escape from the conclusion that the judgment here appealed from cannot be sustained. The decree of divorce gave the custody of the plaintiff to the mother and made no provision for plaintiff’s support, beyond a requirement for the payment by the defendant of sums which have been fully paid by him. The defendant is therefore under no legal obligation to support the plaintiff. The plaintiff is not, however, without remedy. The court which granted the divorce has full power to modify its decree by making such orders as

may be just and proper in view of the conditions shown to exist at the time application may be made to it."

The doctrine in *Lewis v. Lewis*, supra, was modified by the decision of the Supreme Court of such state in *Pacific Gold Dredging Co. v. Industrial Accident Commission*, 184 Cal. 462, which established the principle that under similar circumstances the father is absolved from his legal duty to provide support to his minor child, if such child has other sources of maintenance, but is not absolved from such legal duty if said child has no other source of maintenance. In other words, the minor could not be deprived of his natural right to turn to his father "if the substituted source of supply fails." The *Pacific Gold Dredging Company* case involved a proceeding to review the action of the Industrial Accident Commission in awarding compensation to a minor under the Workmen's Compensation Act on account of the accidental death of his father. The undisputed facts disclosed that the mother of the minor, procured a decree of divorce from the deceased, and the custody of the minor son was therein awarded to the mother. About two (2) years later, the mother placed the boy in an orphanage in Portland, Oregon, and then disappeared, and since that time, no one had any information or knowledge of her existence or whereabouts. The father had also disappeared until some ten (10) years later, and thereafter the father contributed money to his son on several occasions. In 1919, the father outfitted the boy with clothing and sent him money for the travel-

ing expenses to California where he joined his father. They lived together in a cabin for three (3) months, and the father supported the boy, and it was then tentatively agreed between father and son that the father would move to Westwood where he would obtain work and send the boy to school. In the interim, he arranged for the boy to stay in the home of a person with the understanding that the boy was to work for his board and also go to school. This was the situation when the father met his accidental death. The Industrial Accident Commission held that the *boy was a dependent of the father* and made an award accordingly to him. On appeal, the Court referred to Section 196 of the Civil Code for the proposition that when a parent is deprived of the custody of his child, and therefore of his services and earnings, he is no longer liable for his support and education. Then the Court stated the following which has been quoted in many cases thereafter, that is:

“We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child *who has no other source of maintenance*, because on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rests upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may, by misconduct, forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to

turn to his father for maintenance, *if the substituted source of supply fails.*"

The above case has been approved and followed in the following cases:

Llewellyn Iron Works v. Industrial Accident Commission, 191 Cal. 28;

Federal Mutual Insurance Company v. Industrial Accident Commission, 195 Cal. 283;

Fagan v. Fagan, 43 Cal. App. (2d) 189;

Dixon v. Dixon, 216 Cal. 440;

Watkins v. Clemmer, 129 Cal. App. 567.

Each of these cases admittedly involved an impoverished and indigent minor child, whose substituted source of supply or support had failed. In *Watkins v. Clemmer*, *supra*, the Court after referring to the Civil Code sections and many of the cases hereinabove cited, stated (page 577):

"Under the statutory provisions and decisions to which we have referred, we are satisfied that the primary parental obligation in this case was with the mother, and will continue with her until the order (under section 138) is modified or vacated."

The case of *White v. White*, 83 Cal. App. 356, involved a set of facts practically identical to the facts in the case at bar. In this case there was involved an action brought by a minor child, appearing through her guardian, her mother (the divorced wife of the defendant) for an order compelling the defendant (the father of the child) to pay certain sums of money

for the support of the child. The mother and father of said child were divorced in the State of Texas, and by such decree the custody of the said child was awarded to the mother, without any provision being made in the decree for the father's support of said minor child.

The Court reviewed the cases in California, upon the question of the father's obligation, if any, to support his child under the circumstances therein involved. The Court then construed and applied the law of the state, as it should be applied in the case at bar. In restating the California law, the Court, on page 357, stated:

“In such circumstances it appears to have been ruled directly by the higher courts of this state that a separate action by the child against the father to compel him to furnish support for the child will not lie. (*Lewis v. Lewis*, 174 Cal. 336 (163 Pac. 42); *Matter of McMullin*, 164 Cal. 504 (129 Pac. 773); *Ex parte Miller*, 109 Cal. 643, 648 (42 Pac. 428). See, also, *People v. Hartman*, 23 Cal. App. 72 (137 Pac. 611); *In re Perry*, 37 Cal. App. 189 (174 Pac. 105).)

There is, however, later authority to the effect that because in a divorce proceeding the custody of a minor child of the parties has been awarded to the mother, does not relieve the father from his duty to support the child who has no other source of maintenance. (*Pacific Gold Dredging Co. v. Industrial Acc. Comm.*, 184 Cal. 462 (13 A.L.R. 725, 194 Pac. 1); *Svoboda v. Superior Court*, 190 Cal. 727 (214 Pac. 440); *Llewellyn Iron Works v. Industrial Acc. Comm.*, 191 Cal.

28 (214 Pac. 846); *Federal Mutual L. I. Co. v. Industrial Acc. Comm.*, 195 Cal. 283 (233 Pac. 335).) * * *

On the hearing of the instant matter, which resulted in the order to which exception is taken by appellant, no evidence was introduced which showed that the child was in need of support from the defendant. To the contrary, the evidence was to the effect that the child was a remainderman of a one-fourth interest in an estate of the value of \$250,000. Nor, aside from testimony that the wife was the owner of a one-fourth interest in the 'Octagon Drop Forge Co.,' was any showing made regarding the financial ability of the wife to provide the child with the necessities of life.

In the face of the record and the law as hereinbefore noted, it was legally impossible that the relief for which plaintiff prayed be granted."

In other words, the law as restated in the above case, is that where the father has been deprived of the custody of his minor child by a decree of divorce awarding the custody of the child to the mother (without provision for the husband's contribution toward support) the father is absolved from his said duty to so support the child, unless the child "*has no other source of maintenance.*" The burden of proof is upon the plaintiff, or the appellee here, to prove by a preponderance of the evidence that he would have had no other adequate source of maintenance, other than that which he would have received from his father, if he had lived. In other words, that his mother was unable to supply such maintenance, or such "*substituted source of supply fails.*"

In the case at bar, there was no evidence in the record whatsoever, how or in what manner the plaintiff was supported or maintained from the date of the decree of divorce (November 27, 1944), to and including the date of Zehnle's death (December 31, 1944). The only evidence in regard to the maintenance of the child that appears in the record has reference to support subsequent to Zehnle's death, and the testimony in that regard is indeed meager. Mrs. Zehnle testified as follows:

"Q. Now subsequent to Mr. Zehnle's death, what has been the principal means of your support?"

A. Well, between working, and then the insurance that I had from his death." (R. 63).

In other words, there is involved in this case a similar situation as that involved in *White v. White*, supra, where there was no "showing made regarding the financial ability of the wife to provide the child with the necessities of life."

The above and foregoing authorities have not in any way been affected or overruled by subsequent cases, which either involved impoverished or indigent minors, or were cases where "the substituted source of supply fails". Nor have they been affected or overruled by the 1923 amendment to Section 270 of the Penal Code of the State of California.* Said section is purely a criminal section, and does not deal with the civil obligations to a minor child by its

**White v. White*, supra, decided four years after the adoption of said Section 270 of said Penal Code.

parent. As stated in *Watkins v. Clemmer*, supra, at page 526:

“Section 270 of the Penal Code required the father to provide for his minor child regardless of the property settlement, alimony or other similar orders. *It is, of course, a criminal statute.*”

A criminal statute does not provide a procedure or means by which civil rights are created or become enforceable. A minor child could not obtain, through a civil procedure or otherwise, a money judgment for his support because of a violation of the provisions of said Section 270, but he could cause his father to be punished by fine or imprisonment for such a violation. Moreover, Section 196 of the Civil Code which places the obligation of support of a minor child upon the parent to whom the child's custody has been given, has not been repealed, expressly or impliedly by said Penal Code, Section 270, but to the contrary, remains in full force and effect.

In an action for the death of the father, the child can only recover that which he has lost, or, stated in *Powers v. Sutherland Auto Stage Co.*, supra, “the loss by the death of the husband of the legal enforceable right of support against him.” By the decree of divorce the obligation of the support of the plaintiff was transferred from the father to the mother. Since said decree was not modified or amended and the conditions and circumstances existing at the time said decree was entered were not shown to have changed or varied and since there is no evidence that it could be reasonably expected that such substituted

source of support might fail, it must necessarily be concluded that said minor did not suffer a pecuniary loss by being deprived of his father's support.

Furthermore, there is no evidence, which could support an inference that the deceased, if he had lived, would have voluntarily assumed the obligation to support his son. The record shows that the father had no knowledge of the entry of the divorce,* nor that his wife assumed the obligation of the support of their child. There is no expression of his reaction to the divorce. It is known that the deceased, during the period of his marriage, did not perform his legal obligation to support his wife and child; that during the last eight months of his marriage he received wages in the sum of nine hundred ninety-four and 81/100ths dollars (\$994.81), and from said earnings, he paid only one hundred dollars (\$100.00) to his wife for their support. It was likewise known that the wife had to support herself and son (except for such small contributions), and that because of his failure to provide her and their son with the necessities of life, she divorced him, and willingly assumed the obligation to support both herself and her child.

From Zehnle's past conduct it appears natural that he would not voluntarily do that which he was not legally bound to do. He had refused to perform that obligation, when he was legally bound to perform the same.

*The record shows that Zehnle received a summons (R. 83). The fact that he did not know that a decree of divorce had been entered, could be inferred from his letter of December 12, 1944 (R. 77).

V.

VERDICT OF \$20,000.00 EXCESSIVE.

If by any hypothesis, the appellant is in error in its contention that the decedent was legally obliged to support his son, it must be held that a verdict in the sum of twenty thousand dollars (\$20,000.00) was excessive as a matter of law and was such as to suggest, at first glance, passion and prejudice on the part of the jury. Mrs. Zehnle testified that she had no knowledge of Zehnle's earnings from the date of their marriage (September 3, 1941) (R. 56), to the date he left his parents' farm in Minnesota, in April, 1944 (R. 71). There is no evidence of whether he was earning or would earn in the future five hundred dollars (\$500.00), or ten thousand dollars (\$10,000.00) annually. His financial circumstances were not revealed.

Under Section 196 of the Civil Code of the State of California, a parent must give his child support and education "*suitable to his circumstances.*" There is nothing to gauge or determine what the plaintiff was entitled to receive from his father, in the absence of evidence as to the father's financial circumstances. The only item of evidence in this regard is Mrs. Zehnle's testimony that upon her return to California in the forepart of 1944, Zehnle contributed between twenty dollars (\$20.00) and fifty dollars (\$50.00) per month to her and her child's support (R. 61), and plus the further evidence that from the time the decedent entered the Merchant Marine, in April, 1944, to the date of death, she received the sum of one hundred dollars (\$100.00) for their joint support.

In accordance with the accepted annuity tables (on a four per cent (4%) interest basis), the net worth of an annuity of one dollar, payable at the end of each year for an eighteen year period (a period in which the plaintiff would reach his majority) is \$12.65929, and then dividing the present value of an annual annuity of one dollar (\$12.65929), into \$20,000.00, will give the amount that the jury found that the deceased would have contributed annually to his son, if he had lived, which is the sum of \$1579.77 per year, or a monthly contribution of \$131.65.

It is universally held, both by State and Federal jurisdictions that in death actions, the plaintiff is not entitled to a present judgment (payable now and in full) for the full amount of such estimated future receipts, but only for the present value thereof.

Bond v. United R. R., 159 Cal. 270 at 286;

Kit v. Crescent Creamery, 87 Cal. App. 563 at 582;

Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1120, 1122, 77 A.L.R. 1439.

With the existing status of the record and without proof of the financial circumstances of the decedent (either present or prospective) the jury could not have arrived at a verdict in the sum of twenty thousand dollars (\$20,000.00), except through pure speculation and conjecture, for the self-evident reason, that there is no proof that the deceased had, or would have in the future, if he had lived, earned a sufficient sum, after the payment of income taxes, to be able to have paid a monthly contribution to his son in the amount

of one hundred thirty-one and 65/100 dollars (\$131.65), or any other substantial sum. We must ascertain the future by looking through the present, into the past, and find that in the past Zehnle's maximum contribution to the support of both his wife and son was between twenty dollars (\$20.00) and fifty dollars (\$50.00) per month, an average of thirty-five dollars (\$35.00) per month. There was nothing in the record that would warrant the finding that the deceased, if he had lived, would have been able to earn a sufficient net sum annually, to enable him to almost quadruple his former contributions.

The amount of said verdict clearly points inescapably to sympathy by the jury for said minor child. This conclusion is supported by the finding contained in the opinion and order of the Court, by Honorable Martin I. Welsh, Judge, dated May 17, 1946, where the Court found:

“The Court observed the interest manifested in the minor plaintiff by the jurors. It cannot do otherwise than conclude that such interest outweighed, and resulted in a disregard of, the evidence and the instructions. Such disregard resulted in an excessively high verdict.”

In view of the fact that there was no evidence adduced, which would reveal the circumstances of the case upon which the jury could determine the amount of the damages that may be just (Section 6505, Comp. Laws Utah 1917), it appears to be certain that said judgment was either based upon sympathy for the plaintiff or upon passion or prejudice. Therefore the

whole verdict should be declared set aside and the defendant given a day in Court before a fair and impartial jury.

If it be conceded for purposes of argument only, that there was adduced some evidence of allowable damages, then such evidence cannot support a verdict of twenty thousand dollars (\$20,000.00). The discrepancy between the amount of the verdict, and the actual pecuniary loss (if any there was) is so great as to demonstrate that the verdict was entirely unwarranted. The case at bar gives rise to the same problem which confronted the Supreme Court of the State of California in *Hoffman v. Southern Pacific Co.*, 215 Cal. 454, at 460. In the last mentioned case the Court held that the discrepancy between a verdict for fifty thousand dollars (\$50,000.00) and the reasonable amount of the damages was so great as to be entirely unwarranted, and therefore reduced the judgment to twenty-five thousand dollars (\$25,000.00).

CONCLUSION.

It has been demonstrated herein, that the plaintiff has not suffered a pecuniary loss by being deprived of any loss of care, comfort, society or protection, and likewise that the deceased, if he had lived, would not have been legally obligated to support his son. The local law places the latter obligation upon the plaintiff's mother. Hence, there being no proof of any substantial pecuniary loss, the verdict should have been for a nominal amount only.

The alternative position has likewise been demonstrated, that is, if under local law, there was a legally enforceable obligation upon Zehnle to support his son, then appellee failed to prove the financial circumstances of the deceased; in other words the premise upon which the extent of his support must necessarily have to be based, was not proven.

If Zehnle's financial circumstances could have been inferred from the evidence, then the grossly excessive verdict is not supported by the evidence.

Under all of these contingencies said judgment should be reversed and the case remanded for a new trial.

Dated, Sacramento, California,

June 18, 1947.

Respectfully submitted,

HORACE B. WULFF,

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Attorneys for Appellant.

No. 11,536

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY

(a corporation),

Appellant,

vs.

IRENE ZEHNLE and JERRY ZEHNLE, a Minor,
by his Guardian Ad Litem, Irene Zehnle.

JERRY ZEHNLE, a Minor, by his Guardian
Ad Litem, Irene Zehnle,

Appellee.

BRIEF FOR APPELLEE.

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AUG - 1 1947

PAUL P. O'BRIEN



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Ad Litem, Irene Zehnle,

Appellee.

BRIEF FOR APPELLEE.

I.

FOREWORD.

On March 29, 1946, a jury returned a verdict in favor of appellee and against appellant in the sum of Twenty Thousand (\$20,000.00) Dollars. (R. 19.) Judgment thereon was duly filed April 1, 1946. (R. 20, 21.)

Thereafter on May 17, 1946, an order was entered by the trial Court granting appellant's motion for a new trial. (R. 24 to 37.)

Subsequently, on June 11, 1946, the trial Court upon its own initiative entered its order vacating the order granting a new trial and restored appellant's motion for a new trial to the calendar for further hearing. (R. 37.)

On December 13, 1946, the trial Court entered an order denying appellant's motion for a new trial. (R. 38.)

The cause of action arose out of the death of appellee's father, Joseph John Zehnle, who, while riding as a fare-paying passenger on appellant's railroad on December 31, 1944, was killed when the railroad car in which he was riding was derailed and overturned. The cause went to trial on the first amended complaint of appellee, wherein he was the sole plaintiff (R. 5), and appellant's answer thereto. (R. 7.)

Appellee, at the time of his father's death, was two years, five months and fourteen days old. Appellee was born on July 18, 1942. (R. 56.)

II.

STATEMENT OF FACTS.

On this appeal, appellant admits negligence and does not seek a reversal of the judgment upon that issue. (App. Br. 5.)

Specifications of error are limited to excessive damages (set forth in two alternative specifications) and errors in law occurring at the trial in respect to

rulings by the trial Court sustaining objections to questions propounded by appellant relating to her verification of the original complaint wherein she was a party plaintiff. (App. Br. 9, 10.)

This latter specification is not argued in appellant's brief, consequently may be deemed to have been waived and no further reference thereto will be made in appellee's brief.

Appellee's factual statement will therefore be confined to evidence pertaining to the pecuniary loss suffered by him through the death of his father.

The decedent, Joseph John Zehnle, was born March 2, 1914 (R. 57), and at the time of his death was thirty years and ten months old.

He married Irene Zehnle September 3, 1941 (R. 56) in the State of Minnesota. (R. 58.) To this union the child Jerry Zehnle was born on July 18, 1942. (R. 56.) In November 1941, two months after her marriage, Mrs. Zehnle had returned to California (R. 60), where Jerry was born. (R. 61.)

When Jerry was a year old, his mother took him to Minnesota (R. 71), where the father, mother and child lived together for eight months. (R. 61, 71.)

Mr. Zehnle entered the Merchant Marine Service in April, 1944 (R. 59), and about that time, or shortly before, Mrs. Zehnle and Jerry returned to California.

Mrs. Zehnle, feeling that the amounts of money sent her by Mr. Zehnle were inadequate for the support of her and the child (R. 75, 76), on November

27, 1944, secured a decree of divorce in Reno, Nevada (R. 56), upon the grounds of failure to provide. (R. 44.)

This decree (R. 43, 44) was entered upon default of Joseph John Zehnle and awarded the custody of the minor child, Jerry Zehnle, to Mrs. Zehnle. No provision was made therein for child support.

In civilian life, prior to his marriage, Mr. Zehnle had followed the occupation of electrical engineer, earning around \$300.00 per month. (R. 58.) During their married life, up to the time Mr. Zehnle entered the Merchant Marine, he worked on his father's ranch in Minnesota (R. 71), in which he had invested \$1,300.00 at the time of his marriage (R. 58), and he was putting into the farm every dollar he could. (R. 64). He was buying out his mother and dad. (R. 65.)

The only available record of Mr. Zehnle's earnings in the Merchant Marine is Plaintiff's Exhibit No. 3—a withholding receipt issued by the United States Lines showing earnings of \$994.81 for the period July 31, 1944, to December 12, 1944. (R. 60.)

Appellant in his brief (p. 6) refers to these earnings as covering eight months of the year 1944—an average of \$124.35 per month. Manifestly, this is incorrect, as the letters from Mr. Zehnle's employer, the United States Lines (Plaintiff's Exhibit No. 3), states the earnings covered the period July 31, 1944, to December 12, 1944 (R. 60), a period of about four and one-half months, or an average of approximately \$221.00 per month.

During their married life, when Mrs. Zehnle and Jerry were living in California, and Mr. Zehnle was in Minnesota or in the Merchant Marine, he sent Mrs. Zehnle from twenty to fifty dollars a month. (R. 61, 62.)

Mr. Zehnle's attitude in respect to his son was kindly and affectionate. (R. 57.) He had discussed with Mrs. Zehnle for the upbringing of the youngster (R. 57), and he was buying the farm for the three of them. (R. 58, 65, 66.) At the time of his death, he was enroute to Sacramento to see Jerry and Mrs. Zehnle. (R. 63.)

III.

ARGUMENT.

Appellant argues two propositions in respect to the amount of damages awarded. They are:

No proof that plaintiff suffered a pecuniary loss by or through the death of his father. (App. Br. p. 10);

Verdict of \$20,000 excessive. (App. Br. p. 28.)

In effect, both propositions might be placed in the one general category, namely, excessive damages, the question on which is to be approached under the settled rule that

"A verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice

and raises a presumption that it is based on passion and prejudice rather than sober judgment.”

Hughes v. Hearst Publications Inc. 79 A.C.A. 843, 846;

Roedder v. Lindsley, 28 Cal. (2d) 820, 823.

Appellant argues that there was no proof that the plaintiff suffered a pecuniary loss by the death of his father in that (a) no proof was made of loss of care, society, comfort, and protection, and (b) no proof was made of loss of support.

We submit that there is evidence to support the verdict.

An appellate court may not weigh evidence as a jury might in reaching a verdict.

Grossetti v. Sweasey, 176 Cal. 793.

A verdict, if supported at all by evidence setting out a reasonably credible story, is conclusive on appeal.

Bank of Orland v. Harlan, 188 Cal. 413.

At page 7 of appellant's brief, it is argued that decedent during a period of eight months contributed only \$100.00 to the support of his family. This statement is based upon the contents of certain letters introduced in evidence, one of which (Plaintiff's Exhibit No. 5) refers to the transmittal of \$100.00 for Christmas purposes by decedent to Mrs. Zehnle. (R. 81.) Notwithstanding Mrs. Zehnle's testimony that decedent sent sums varying from twenty to fifty dollars per month regularly, it is argued that the letters show only a contribution of one hundred dollars.

The evidence speaks for itself and there was credible testimony of generous contributions made regularly.

Appellant seeks to place a great deal of stress upon the fact that Mrs. Zehnle established residence in Nevada and filed suit for divorce from the decedent alleging his failure and refusal to provide her with the necessities of life. (App. Br. p. 7.)

This completely ignores the fact that appellee, Jerry Zehnle, was not a party to the Nevada action and his mother did not allege any failure to provide for the child, and even if she had, her statement in the divorce action would not be binding upon appellee in this action.

Appellant concedes at page 9 of his brief that there was evidence that the deceased father had been planning and was ambitious for the child's future and that decedent had the ordinary paternal attitude of a father for his child.

(a) LOSS OF CARE, SOCIETY, COMFORT AND PROTECTION.

In respect to care, society, comfort and protection, appellant argues that because the Nevada divorce decree awarded custody of appellee to Mrs. Zehnle, the child was not entitled to, nor could the father, had he lived, bestow any care, society, comfort or protection.

Damages in a wrongful death action are based on the valuation of the benefits which the heirs probably

would have received from the decedent had his life not been taken, and in a case of this character, the damages sustained are largely of a *prospective nature*. (Emphasis supplied.)

Valente v. Sierra, 158 Cal. 412, 419.

The child * * * is not to be deprived of its natural and legal right of protection and support by its father because of any family quarrel or any agreement between husband and wife. It is not a party to divorce proceedings. It is not barred as to its rights by any decree therein.

McAllen v. McAllen, 106 N.W. 100 (Minn. 1906).

We think that the legal family status of the decree was limited merely to custody and deprived the father of the right to share therein. * * * The father's paternal interest in his minor child was in no wise affected. * * * The divorce dissolved the legal family relation between the husband and wife, but under what legal or humane consideration could it be accorded the force of destroying the natural family tie between father and child.

Fosters Estate, 220 Pac. 734 (Nevada Supreme Court).

The jury was instructed that in determining the pecuniary loss, if any, suffered by plaintiff in being deprived of the society, comfort and protection of his father, they had the right to consider the effect of the separation of the parents by a divorce decree which awarded sole custody to the mother and the fact that plaintiff and his father were living apart and in different states.

They were further instructed that if they found that in all probability Jerry Zehnle would continue during his minority to live apart from his father (if the latter had lived) then nothing could be awarded to plaintiff for the loss of the society, comfort and protection of the deceased and the amount of their award, if any, must be solely attributable to the loss of the legally enforceable right of support, if any there be. (R. 98, 99.)

We have no way of knowing whether or not the jury made any segregation of damages in respect to loss of society, comfort and protection on the one hand and loss of support on the other hand, but we submit that there was ample evidence to support the probability that the deceased father would have continued to bestow upon his son society, comfort and protection, and certainly there is nothing in the record to indicate the contrary.

That he had a normal paternal interest in his son is manifest by the following excerpts of testimony of Mrs. Zehnle.

“Q. Now in respect to your son and Mr. Zehnle’s son, what was the attitude generally of Mr. Zehnle toward Jerry Zehnle? I mean by that just tell the jury was he kindly and affectionate, or just what feeling he had or regard he had for the little boy?

A. Oh, he was very kind to him, loved him very much, took him on trips, hay rides and the barn to see the pigs and cows and things like that.” (R. 57.)

* * * * *

“Q. Now, had he ever discussed with you any particular plans in respect to the upbringing of the youngster, the future of the youngster?

A. He did.

Q. And of what nature were they?

A. Well, he was—when we first married he put down \$1300.00 on the farm; that was to buy over for Jerry—and for the three of us.

Q. This was the farm that was located back in Minnesota?

A. Yes.

Q. And on which his parents were residing, is that correct?

A. Yes.” (R. 57, 58.)

* * * * *

“Q. Now in respect to Mr. Zehnle’s earnings, had he ever discussed with you what disposition he was making of over and above what money he sent you for your support and Jerry’s support?

A. He was putting everything into the farm except what he sent me.

Q. This was the farm in Minnesota upon which his folks were residing, is that correct?

A. Yes.

Q. Had he ever discussed with you Jerry’s future?

A. Yes, he did.

Q. And what discussion did he have with you and what did he say in respect to whatever objectives he had in mind for Jerry?

Mr. Wulff. And when, please?

Mr. O’Hara. During any discussion you had with him.

A. Well, he was always planning on his future ahead for years——

Mr. Wulff. A little louder, please. I can't hear you.

A. He was planning on his future ahead for years for him, going to school and for the farm, for him to get it. He was buying his mother and dad out.

Mr. O'Hara. Q. At times when you were with him, you and Jerry were with him, he was, you testified, kindly and affectionate toward the child?

A. Yes, he was.

Q. Was ambitious for the child's future?

A. Yes.

Q. And during the time you were away from him and the time he was in the Merchant Marine he communicated with you regularly, did he?

A. He did.

Q. And did he ever express himself about the youngster?

A. Yes, he did.

Q. Were those expressions in the ordinary paternal attitude of a father toward a child?

A. Yes." (R. 64, 65, 66.)

In his letters to Mrs. Zehnle, the decedent was constantly referring to Jerry, viz.:

"Mr. O'Hara. Reading from Plaintiff's Exhibit No. 7 on the letterhead of U. S. Maritime Service Training Station, Sheepshead Bay, New York, July 5, 1944.

"Dear Irene and Jerry: Hope this finds you both well. We got back to New York yesterday. As soon

as I get a chance I will send you some money. I will also send you 25 dollars for Jerry. I want you to buy something for his birthday. Hope you can get him something nice. Tell him it is from his Daddy. I got your letter yesterday. The first mail in over a month. This ship has to go in for repairs. I may get home a few days. I won't have time to come to Sacramento. After my next trip I may try and ship out of Frisco. That won't be till fall. You can send a letter home to let me know if you get the money O.K. Well, I must close. There isn't much to write. Love, Joe." (R. 84, 85.)

* * * * *

"Mr. O'Hara. On the letterhead of Council Club, a Dormitory and Breakfast Canteen for Service Men, 2 East 76th St., New York 21, N. Y. (Plaintiff's Exhibit No. 8, postmarked July 28, 1944.)

"Dear Irene and Jerry: Well, here I am back in New York again. Think I will ship in a few days again. How are things around there? Did you get the money I sent? Hope to try and come out to California after my next trip. Have no idea how long I will be out. Thanks a million for the nice pictures you sent. You both look well. I am very proud of Jerry. You sure take good care of him. Well, there isn't much to write from here. I will write again when I leave. Love, Joe." (R. 86.)

* * * * *

"Mr. O'Hara. Reading now from Plaintiff's Exhibit No. 5, a letter dated New York, New York, October 10, 1944:

“Dearest Irene and Jerry: Well, I got paid today so thought I would send you some money for Xmas in case I don’t get back in time. 50 is for you, Irene, and 50 is for Jerry. I want you to buy yourself something nice. Get Jerry something nice too. Tell him it is from his Daddy. I hope I can spend Xmas with you and Jerry. I sent 200 dollars home for my dad to keep for me until I get there. Right now Irene I have exactly four dollars in my pocket. I don’t need any money on the ship. I’m afraid, if I kept much money I’d go out and get drunk. (That is the way I feel.) Well, honey, I must ring off. Be a good girl and take care of my little boy. Love, Joe.” (R. 81, 82.)

* * * * *

In his next letter (Plaintiff’s Exhibit No. 6, R. 82 and 83), a letter dated November 10, 1944, decedent indicated he had received the summons in the divorce case. His devotion to his child was in no way altered:

“Mr. O’Hara. Reading now from Plaintiff’s Exhibit number 6, a letter captioned “New York, New York, November 10, 1944:

“Dearest Irene and Jerry: Well, here I am back in N.Y. again. We got in yesterday. I didn’t get a chance to write sooner. We leave again Mon. or Tuesday the 14th or 15th. We should be back again about the 15th of December. I’m going to take my 30 days as soon as I get back. I’ll let you know when I get back again. I’m going to go home for a few days then I’ll come to see you and Jerry. I’ll let you

know when I leave home. Don't spend any money on me for Xmas. Spend it on yourself and Jerry. By the way, I bought Jerry a 25 dollar bond last trip. In ten years from now he will want a bicycle or something. Then he will have his own money. I also have a few small things I picked up in France and England. I got my mail yesterday. Was happy to get your letter. I received the summons from your lawyer. I guess you forgot to tell him I'm a seaman. Well, honey, I must ring off. I'll sure be glad when the next trip is over. Tell Jerry his Daddy is coming home soon. Love, Joe." (R. 82, 83.)

* * * * *

A second letter subsequent to decedent's receipt of the summons again indicates his interest in and desire to see his child:

"Mr. O'Hara. Reading from Plaintiff's Exhibit number 4, it is a letter dated New York, N. Y., December 12, 1944:

"Dearest Irene: Well, here I am again. We just got in. Haven't been able to get off the ship yet. I think we will get passes this evening. I hope so. I want to mail this letter. I'm going to try and get off the ship tomorrow. I'll go home for a few days and then I'll come to see you and Jerry. Hope you's are both well. I'll let you know when I leave home. I have a lot of things to do tomorrow. I haven't got my mail yet. Well, honey, I'm in a hurry so must ring off. Will see you soon. Love, Joe." (R. 79.)

The foregoing conclusively demonstrates that, regardless of the mother's judgment, good or bad, in

getting a divorce, the father maintained a normal, healthy paternal interest in his child and the evidence is sufficient to show a reasonable probability that the society, comfort and protection to the surviving child was of such a character that it would be of a pecuniary advantage to the child, and that a deprivation thereof would entail a pecuniary loss to him.

Sanfilippo v. Lesser, 59 Cal. App. 86.

(b) LOSS OF SUPPORT.

Appellant argues there is no proof of loss of support and cites the Nevada divorce decree which made no provision requiring the deceased father (defendant therein) to pay any sum whatsoever for the support of his minor child.

In his presentation of this question, appellant ignores one important factor, namely, the lack of jurisdiction in the Nevada Court to award a money judgment against a non-resident defendant.

The decedent, who was the defendant in the divorce action, was a non-resident of the state of Nevada, was not personally served with summons within the state and did not appear in the action. Consequently, no money judgment could be obtained against him.

Shillock v. Shillock, 24 C.A. 191;

Comfort v. Comfort, 17 Cal. (2d) 736;

De La Montanya v. De La Montanya, 112 Cal. 101;

Merchants Natl. Union v. Buisseret, 15 C.A. 444.

The Supreme Court of Nevada in *Foster's Estate*, 220 Pac. 734, has expressed its rule that divorce and deprivation of custody in no wise affects or relieves the *natural* and *legal* obligation of a father to support his minor child. He is liable for the maintenance of his child notwithstanding the decree.

The Supreme Court of Utah in *Burbridge v. Utah Light and Traction Co.*, 196 Pac. 556 has stated that

“a father being legally bound to support his minor children, and the law providing means by which they can compel him to support them, they are entitled to damages for his wrongful death, though he did not recognize his legal obligation to support them; and this obligation and their prospective inheritance are proper questions to be considered by the jury in fixing damages.”

The Minnesota Courts in *McAllen v. McAllen*, 106 N.W. 100 have said

“The obligation of progenitors to support their offspring rests upon an entirely different foundation from that upon which the law bases the duty of husband to care for his wife. That obligation is at once legal and natural. It springs as necessarily from law as from the primal instincts of human nature. Its consistent enforcement is equally essential to the well being of the state, the morals of the community, and the development of the individual. * * * The child * * * is not to be deprived of its natural and legal right of protection and support by its father because of any family quarrel or any agreement between husband and wife. It is not a party to divorce proceedings. It is not barred as to its rights by any decree therein.”

The character and extent of father's obligation to support minor child, and status of minor are generally determined by law of father's domicile and not by place of child's residence.

Yarborough v. Yarborough, 290 U.S. 202.

The California Supreme Court has had no difficulty in establishing the rule that dependency of an heir in a death case, where divorce, separation and deprivation of custody have intervened may be established:

(1) By voluntary resumption on the part of the father of his parental relations and obligations to his child.

(2) By the legal liability for the support of his child imposed by the terms of the divorce decree.

(3) *By the basic legal obligation imposed by law upon a father to support his dependent child to the end that it shall not become a public charge.* (Emphasis supplied.)

Mutual L. Ins. Co. v. I.A.C., 195 Cal. 283.

"Since the recasting of Section 270 of the Penal Code in 1923 * * *, the failure of a father to provide necessary support and maintenance for his minor child has been a criminal offense. This is true regardless of agreements, property settlement, decree of divorce or decrees respecting custody or maintenance of the minor, affecting the husband and wife. All doubt or confusion on this subject has also been settled by recent decisions of this court. (Citing *Mutual L. Ins. Co. v. I.A.C.*, 195 Cal. 283; *Sou. Cal. Edison Co. v. I.A.C.*, 92 C.A. 355)."

Dixon v. Dixon, 217 Cal. 440, 442.

Section 270 of the Penal Code of the State of California reads as follows:

“Omitting to provide child with necessities: Evidence: Dead or incapacitated father: Operation of Section: A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by imprisonment in the county jail not exceeding two years or by a fine not exceeding one thousand dollars, or by both. This statute shall not be construed so as to relieve such father from the criminal liability defined herein for such omission merely because the mother of such child is legally entitled to the custody of such child or because the mother of such child, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child, or undertakes to do so.

Evidence: Proof of abandonment or desertion of a child by such father, or the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse.

Dead or incapacitated father. In the event that the father of either a legitimate or illegitimate minor child is dead or unable by reason of physical or mental infirmity to furnish the necessary

food, clothing, shelter or medical attendance or other remedial care for his minor child, the mother of said child shall become subject to the provisions of this section and be criminally liable for the support of said minor child during the period of inability on the part of the father to the same extent and in the same manner as the father would have been had it not been for his physical or mental infirmity.

Operation of section. The provisions of this section are applicable whether the parents of such child are married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."

In respect to support, Mrs. Zehnle testified as follows:

"Q. Now during the time you lived in Minnesota after the baby was born, Mr. Zehnle supported the youngster and yourself, is that correct?

A. Yes, he did.

Q. Upon your return to California with the baby--you and the baby came together, is that correct?

A. Yes.

Q. Did Mr. Zehnle contribute to the youngster's support and your support?

A. Yes, he did.

Q. And he would send you money from time to time?

A. Yes.

Q. And in what amounts, average amounts, would they be?

A. Well, it was between twenty and fifty.

Q. Dollars?

A. Yes.

Q. What?

A. Between twenty and fifty dollars.

Q. A month, or what?

A. Yes, a month.

Q. And did that continue after he went into the Merchant Marine?

A. Yes.

Q. He would send you money from time to time?

A. Yes, he did.

Q. Maintaining about the same average, is that correct?

A. Yes." (R. 61, 62.)

* * * * *

"Q. Had he returned from a voyage around December 12, 1944?

A. Yes, he did.

Q. Did you hear from him around that time?

A. Yes, I did.

Q. And did you hear from him subsequent—or just prior to the time that he was enroute out here when this train wreck occurred?

A. Yes, I did.

Q. And he had sent money to you, had he?

A. Yes, he did.

Q. When was the last occasion that you had received money from him just prior to his death?

A. The last time I received money was when he was in New York. He sent \$50 for a Christmas present and \$50 for Jerry." (R. 62, 63.)

* * * * *

"Q. Now, Mrs. Zehnle, the money that Mr. Zehnle sent you from time to time, that average, as you stated, the amount per month, was that money used by you for the support of Jerry?

A. Yes, it was.

Q. And were you dependent upon that money to any extent?

A. Yes, I was.

Q. For the support of Jerry?

A. Yes." (R. 63.)

* * * * *

"Mr. O'Hara. Q. Now, Mrs. Zehnle, it is true that you did secure this decree of divorce on the ground of failure to provide. That is right, isn't it?

A. Yes.

Q. However, it is also true, is it not, that Mr. Zehnle did make some contribution toward your support and that of Jerry at all times, isn't that true?

Mr. Wulff. Just a moment.

A. He did.

(Objection and argument.)

A. He did.

Q. I take it then—is it a correct statement that your allegation and securing a divorce on the ground of failure to provide was not as a result of a complete failure to send anything but what you felt was inadequate, is that it?

A. Yes.

Q. In other words, you have testified on your direct examination that he sent you varying sums ranging from twenty to fifty dollars a month, is that right?

A. Yes.

Q. Was that sufficient?

A. No, it wasn't.

Q. —for you to support yourself and your youngster on?

A. No.

Q. You had to supplement that with your own earnings?

A. Yes, I did." (R. 74, 75, 76.)

We believe the foregoing fully establishes that appellee was dependent upon his father for support and refutes appellant's argument that plaintiff failed to prove that his mother was unable to supply such maintenance. (App. Br. p. 24.)

The jury was fully instructed on this phase of damages and were told by the Court that the mother was primarily responsible for plaintiff's support, so long as the custody provision of the divorce decree remained in effect and that decedent was released from his obligation to support his son unless, had decedent lived:

(1) A court of competent jurisdiction would order decedent to pay certain sums for support, etc.

(2) The mother should abandon the child or become financially unable to support him the son then by legal proceeding could compel his father to support him.

(3) The plaintiff became poor and indigent without any means of support so that he would become a public charge, then his father would be obligated for his support.

(4) The father could have voluntarily resumed his parental relations and obligations by giving his son money for support, etc.

The instruction further told the jury to consider the probability, or lack of probability, of the happening of any of the aforementioned contingencies in order to determine the amount of money, if any, it could be reasonably expected that decedent would have paid for plaintiff's support, had the former lived. (R. 97, 98.)

This instruction was far more favorable to appellant than the settled law of the State of California, for it completely ignored that factor laid down by the California Supreme Court in *Mutual L. Ins. Co. v. I.A.C.*, 195 Cal. 283, namely, that dependency is established by the basic legal obligation imposed by law upon a father to support his dependent child.

Appellant at page 8 of its brief states there was no evidence in the record after the death of Zehnle the mother was unable to support her child, but that on the contrary, the mother testified that she was able to support herself and child by working and from the insurance money she was receiving.

The following excerpts of testimony should conclusively show the fallacy of appellant's statement for the reason that the insurance payments were to be

over a temporary period only expiring at the end of the year, 1947.

“Q. Now, subsequent to Mr. Zehnle’s death, what has been the principal means of your support?

A. Well, between working, and then the insurance that I had from his death.

Q. You received some insurance money?

A. Yes sir, I did.

Q. Life insurance money?

A. Yes.

Q. And was that paid to you in a lump sum, or is that being paid to you over a period of months or years.

A. A period through months.

Q. And under the policy you receive so much per month, is that correct?

A. Yes.

Q. Will you state to the jury just what the amounts are that you received, that is, the various amounts during the period that the policy runs?

A. I receive a hundred dollars a month for the first year, and the second year seventy-five and the third, fifty dollars a month.

Q. So that during the year 1945 you have received \$100 a month from the proceeds of this policy, and the second year, 1946, you are receiving \$75 a month, and in 1947 you receive \$50 a month.

A. Yes.

Q. And then that will be the termination of the proceeds of the policy at the end of 1947, is that correct?

A. Yes.” (R. 63, 64.)

(c) VERDICT OF \$20,000.00 NOT EXCESSIVE.

Appellant argues that the only basis for the jury award was loss of support. Presumably, he means that loss based upon society, comfort and protection could not be considered.

As hereinabove pointed out, the jury was instructed the effect of the separation and divorce of the parents and to weigh the probability of whether or not, under such circumstances the father would have continued to bestow society, comfort and protection to his minor son.

It is presumed that the jury intelligently followed the instruction and did weigh the probability.

Certainly the separation occasioned by the father's service in the Merchant Marine cannot be consistently considered. His letters continually express devotion to and interest in his son and if service to one's country in time of war is a debit against society and protection then millions of families in this country lived in a state of separation and the family suffered deprivation of society and protection of the father during the war years and a tort-feasor could with complete impudence claim a credit against any damages assessed against him.

There was sufficient evidence to warrant the jury finding that appellee and decedent would have held a close contact, had not death intervened. Mrs. Zehnle's testimony established decedent's affection toward the boy, the father's interest in his future and his plans for raising the child and for the

acquisition of the farm decedent was buying from his mother and father.

At the time of his death decedent was enroute to Sacramento to see his boy.

This should dispose of appellant's argument as to the excessiveness of the verdict, however, he presents an arithmetical problem based upon the commuted value of an annuity which has nothing to do with the case for two reasons.

The first, there was evidence of loss of society and protection upon which the jury was instructed, and in arriving at pecuniary loss in a death case the standard for measurement of damages is composed of two elements; namely, loss of comfort, society and protection as one, and loss of support as the other. *Peters v. S. P. Co.*, 160 Cal. 48. Pecuniary loss is not dependent upon any "legal liability." *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 57 L. Ed. 417. It is sufficient if the evidence shows a consistent purpose to contribute. *The City of Rome*, 48 F. (2d) 333, 338.

The second reason is that the legislature of the State of California has not declared the money value of a life annuity to be the measure of damages in an action for death, but has determined to leave the subject of damages at large, to be determined by the jury, with the single restriction that the damages allowed should be just, under all the circumstances of the case. *Redfield v. Oakland C.S. Ry. Co.*, 110 Cal. 277.

Apropos of appellant's comment at page 30 of his brief quoting a portion of the trial judge's opinion

wherein he refers to the interest manifested in the minor plaintiff by the jurors, it is sufficient to say that the trial judge withdrew this opinion in its entirety. (R. 37.)

The record indicates that nothing occurred during the trial to excite the passion and prejudice of the jurors. *Cole v. Chicago St. P.M. & O. Ry. Co.*, 59 Fed. Supp. 443. (D. C. Minn.)

When attacked upon the ground of excessive damages, a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment. *Hughes v. Hearst Publications Inc.*, 79 A.C.A. 843, 846; *Roedder v. Linsley*, 28 Cal. (2d) 820, 823.

CONCLUSION.

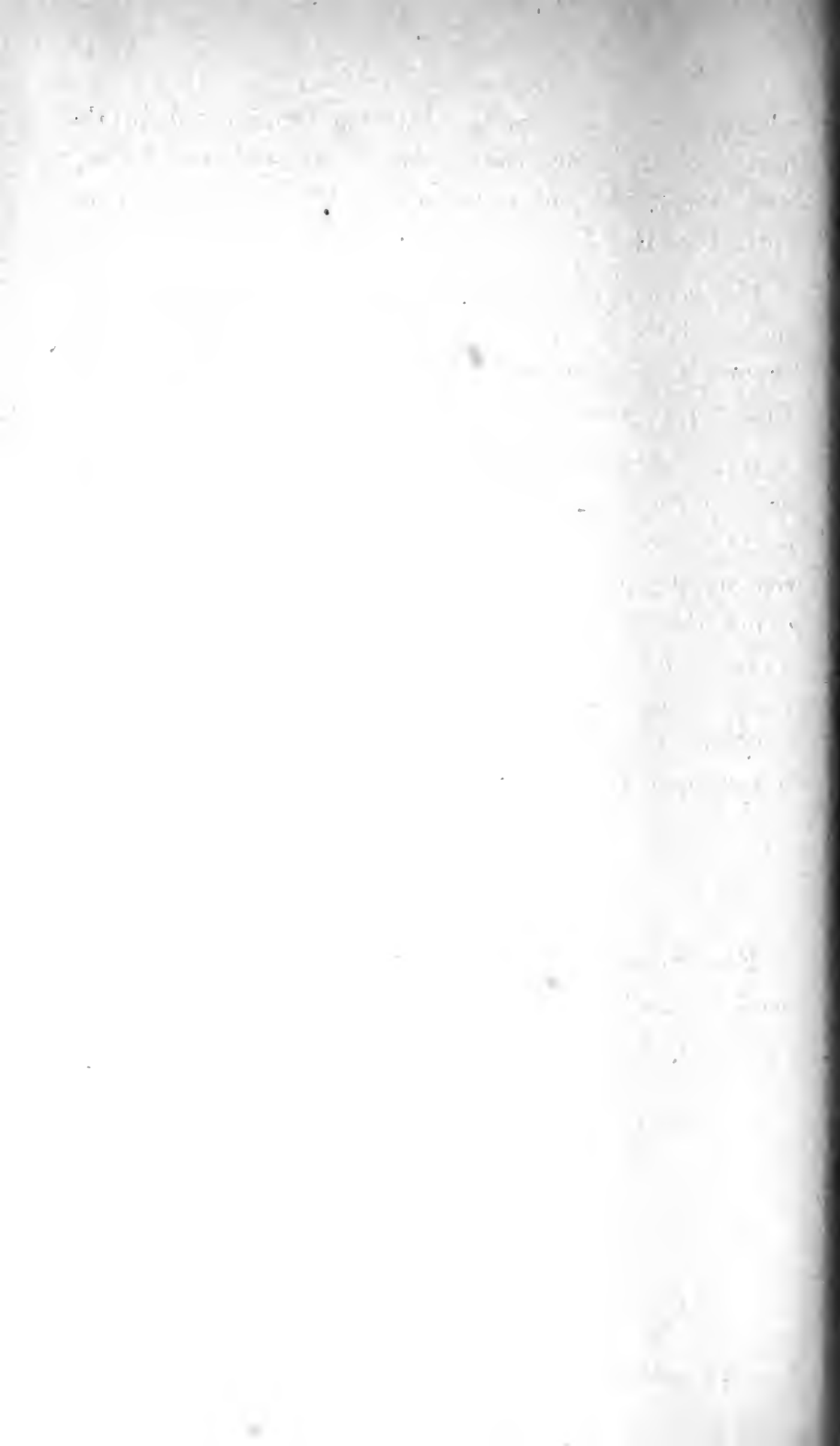
For the foregoing reasons it is respectfully urged that the judgment should be affirmed.

Dated, Sacramento, California,
July 25, 1947.

Respectfully submitted,

THOMAS O'HARA,
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EMMET J. SEAWELL,

Attorneys for Appellee.



No. 11,536

United States
Circuit Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,

Appellant,

VS.

IRENE ZEHNLE and JERRY ZEHNLE, a
Minor, by his Guardian Ad Litem,
IRENE ZEHNLE,

Appellees.

APPELLANT'S PETITION FOR A REHEARING

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Petitioner.*

FILED

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PAUL P. O'BRIEN,



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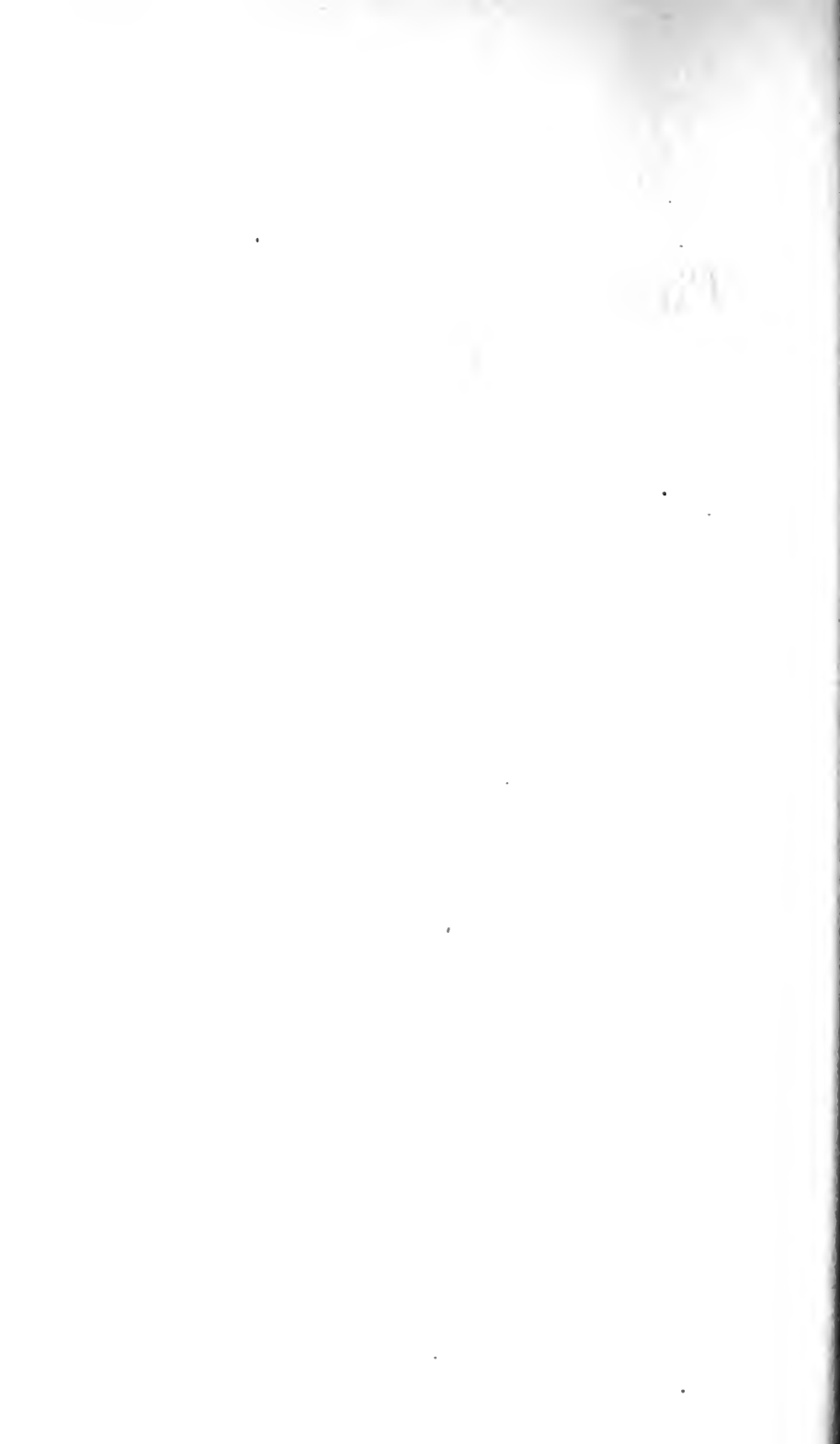
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United States
Circuit Court of Appeals
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SOUTHERN PACIFIC COMPANY,

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VS.

IRENE ZEHNLE and JERRY ZEHNLE, a
Minor, by his Guardian Ad Litem,
IRENE ZEHNLE,

Appellees.

APPELLANT'S PETITION FOR A REHEARING

*To the Honorable Francis A. Garrecht, Presiding Judge,
and to the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The above named appellant, Southern Pacific Company, a corporation, respectfully petitions your Honorable Court for a rehearing of the above entitled cause after affirmance by it of the judgment made and entered in the District

Court of the United States in and for the Northern Division of the Northern District of the State of California, upon the grounds as hereinafter set forth.

The primary ground for rehearing urged is that the opinion is based upon an unwarranted construction of both the laws of the State of Utah and the State of California, on what constitutes a recoverable pecuniary loss to the beneficiary caused by wrongful death.

The appellant has particular reference to the apparent basis of the holding of the court that "the evidence of a *likelihood* of a child losing such support, society, care, comfort and protection is sufficient to sustain the verdict." The only basis for such finding appearing in the opinion, is

(a) That since the custody of a son may be changed by the court from the mother to the father, so that the minor son "may have male training to equip him to meet the world," the jury "may well have inferred that there was a substantial likelihood that this loving father and his son would come together in a father guardian relationship," and

(b) That if the question of the father's liability to support his son had been litigated in the Nevada Court, it may well have been for the latter's full support.

Therefore, as it appears from the opinion, this court has sustained a Twenty Thousand Dollar verdict solely through a practice long condemned by local law, that is, permitting an allowance for purported pecuniary loss to be based upon a mere likelihood or upon circumstances which did not appear from the evidence, but which rested upon conjecture and imagination. The local law does not

permit a change of the custody of a minor from one parent to another, except when there exist facts and circumstances showing that the parent having the custody is morally unfit or mentally incompetent to have the custody of the child, or the presence of some other facts which would require the change for the welfare of the minor. Furthermore, no court would require the father to provide full support, unless the evidence showed that the father could give or was better able than the mother to provide such support. In the case at bar, there is no evidence showing a reasonable probability of an existing circumstance or of the future existence of any circumstances, that would warrant a court in changing the custody of the appellee from his mother to his father, had the latter survived. Likewise, there is no evidence of the earnings, if any, of the decedent since the summer of 1941 (other than during the foregoing four months service in the Merchant Marine), nor any evidence of Mrs. Zehnle's earnings. No court would, or could fix the liability of either parent in any action between them with such absence of essential evidence, particularly when the evidence is or should have been easily made available.

If these suggested liabilities of deceased could not have been imposed upon the deceased, if he had lived, under such a record as existed in the case at bar, how could a different and a grossly excessive liability be imposed upon the appellant, except by way of punitive damages or punishment? If this opinion is permitted to stand, a new and different measure of damages in death cases will be created for the Federal courts, which is absolutely in conflict with local law, with a result that plaintiffs in death

cases would seek to litigate in the Federal courts, in lieu of the State courts (when the defendant is a non-resident), in order to gain a verdict which is not legally obtainable in the State court. Such a procedure would deprive a non-resident of due process and of a fair or impartial trial, the very conditions that prompted granting of jurisdiction to Federal courts in controversies between a non-resident party and a resident party.

I.

THE OPINION IGNORES AND IS IN CONFLICT WITH RULES ESTABLISHED FOR THE ASSESSMENT OF DAMAGES IN DEATH CASES BY LOCAL LAW.

An action for wrongful death is governed by the law of the jurisdiction where the tort is committed (see 8 Cal. Jur., 976), that is, in the case at bar, the law of the State of Utah.

Section 2912 of the Compiled Laws of the State of Utah of 1907, one on which this action is based, is identical to Section 377 of the Code of Civil Procedure of the State of California, that is, "such damages may be given as under all of the circumstances of the case may be just." A research will reveal that the courts of both states have been fairly uniform in their construction and operation of the statute. As to the limits of recovery in a death case in the State of Utah, the leading case appears to be *Evans v. Oregon Short Line R.R. Co.*, 108 Pac. 638, where the court, on page 641, clearly states the measure of recovery as follows:

"True, the loss under our statute in a large sense is a pecuniary loss merely, since nothing can be re-

covered by way of solace for injured feelings or for mental suffering of the family by reason of the death of the husband and father. Whatever is allowed by the jury must therefore be by way of pecuniary recompense for the loss sustained by the wife and minor children, and must be *strictly limited* (1) *to what the evidence shows the deceased contributed, and thus would probably have continued to contribute* to them in money or other means by way of support and as an accumulation to his estate; and (2) to the money value of the injury suffered by the wife and minor children by reason of the loss of the advice, comfort, and society which they enjoyed prior to the death of the deceased and which would have been continued for their benefit. *If the evidence is to the effect that the widow and minor children suffered no loss upon the first ground because the deceased provided neither money nor other means of support, they still may be entitled to something upon the second ground, because the society of the deceased may have been a comfort and his advice of material assistance to them. Again a wife and children may have lost little or nothing upon either or both grounds, and the jury should then compensate them only for what they have lost, and, in case they have lost upon both grounds, they should receive compensation to the extent of their loss. The jury should be informed that any allowance they may make must be limited to what the wife and children received from the deceased upon either one or both grounds to which we have referred * * ** (Italics ours)

Further, the Court stated on page 641:

“The statute clearly implies that, in order to arrive at the real injury the wife or the minor children have sustained, the *jury should be advised of just*

what they received from the deceased by way of pecuniary aid and assistance, and also what they received from him by way of comfort, advice and companionship." (Italics ours)

The California courts also followed the principle announced in the *Evans* case, *supra*, as is clearly shown by the statement appearing in *Johnson v. Western Air Express Corporation*, 45 Cal. App. (2d) 614 at 623, where the court stated:

"The measure of damages in such case is what the heirs were receiving at the time of the death of the deceased and what such heirs would have received had decedent lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation."

In other words, the measure of damages is strictly limited as to what the evidence shows the beneficiary had received during the life of the decedent, and to that which the evidence shows would in all reasonable probability have been continued for their benefit, if the decedent had lived. Hence, under the local law, in the absence of proof tending to show an actual damage or a probable loss with reasonable certainty resulting to the beneficiaries from the death, the beneficiaries' recovery should be limited to normal damages, or as stated in *Parsons v. Easton*, 184 Cal. at 774:

"* * * Manifestly, no allowance can be made because of a possible loss arising from circumstances which do not appear from the evidence and which rest upon conjecture and imagination." (Italics ours)

The opinion completely ignores the evidence of what the decedent had contributed to the support of his child

during his lifetime, and also the money value of the loss (if any) of other benefits enjoyed prior to his death, and ignores the fact that there is a total lack of evidence that any contributions and benefits would have been continued, if the decedent had lived.

Since a child's pecuniary loss for the death of his father as stated in *Evans v. Oregon Short Line R.R. Co.*, supra, is limited to two elements of damage, a review of the evidence in regard thereto will demonstrate that a verdict of Twenty Thousand Dollars (\$20,000.00), being the present value of the annuity for the minority of the appellee in the sum of One Hundred Thirty-one and 65/100 Dollars (\$131.65), per month cannot be supported by the evidence.

II.

NO PROOF OF ANY SUBSTANTIAL LOSS OF COMFORT, SOCIETY OR PROTECTION

Under the law the loss, comfort, society or protection is recoverable only in the sense of and not in addition to pecuniary loss.

Morgan v. Southern Pacific Co., 95 Cal. 510;

Pepper v. Southern Pacific Co., 105 Cal. 339;

Parsons v. Easton, 184 Cal. 764;

Griffey v. Pac. Electric Ry. Co., 58 Cal. App. 509
at 519.

If the society of the deceased was of no financial value to the beneficiaries, no damages can be awarded for its loss. *Dickinson v. Southern Pacific Co.*, 172 Cal. 730, 731.

This expectation must be based upon some fact or facts aside from the relationship. *Griffey v. Pacific Electric Ry. Co.*, supra, at page 518.

The law recognizes that there may be a pecuniary loss from the death of a husband or father arising from such deprivations, but as stated in *Sanfillippo v. Lesser*, 59 Cal. App. 86:

“* * * *But this is not a universal right existing in every case. It is allowable only where the ‘circumstances’ show a reasonable probability that the ‘society, comfort, and protection’ afforded to the surviving parent or wife was of such a character that it would be of pecuniary advantage to the parent or wife, and that a deprivation thereof would entail a pecuniary loss to them. Thus in the Beeson case the court said: ‘The loss of a kind husband might be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy.’ Manifestly no allowance can be made because of a possible loss arising from circumstances which do not appear from the evidence and which rest upon conjecture or imagination. The evidence in this case does not show circumstances indicating that the society, comfort and protection of the son had been of any appreciable pecuniary advantage to the plaintiffs, or any reasonable probability that it would be so in the future. It may be that they dearly loved him and that they loved him the more because of his infirmities and helplessness. But it is pecuniary loss only, and not the loss of an object of love and affection that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person.*” (Italics ours)

In *Ure v. Maggio Bros. Co.*, 24 Cal. App. (2d) 490, the court restated the law in California on this question, as follows:

“* * * But it must never be forgotten that, in fixing the amount, the jury is always bound by the fundamental rule that the pecuniary value of the society, comfort, and protection is the limit of recovery for a loss of that character, and the amount allowed therefor must have some reasonable relation to the pecuniary value shown by the evidence. In this case the father doubtless dearly loved his daughter; but ‘it is pecuniary loss only, and not the loss of an object of love and affection, that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person’. (*Parsons v. Easton*, supra).” (Italics ours)

As to the past, the evidence shows that the appellee during the two and a half years of his life, had lived with and seen his father for only an eight month period (R. 61, 70), and at the time of death, the decedent had been legally deprived of the custody of his son* by a final decree of divorce of the Nevada court, which granted the sole care, custody and control to the mother. The legal effect of said decree of divorce was to separate the Zehnle family, the mother and child maintaining a household several thousand miles distant from the decedent’s resi-

*Since the complaint in the Nevada action alleges that Jerry Zehnle resided with the plaintiff, Irene Zehnle in Washoe County, Nevada, the Nevada court had jurisdiction to award the custody of said child to the mother. (See *De La Montayna v. De La Montayna*, 112 Cal. 101, at 116). Hence, the power of the Nevada Court to grant custody of the child to the mother cannot be questioned.

dence. There was no evidence adduced showing any probability of a reconciliation between Mr. and Mrs. Zehnle. There is not an iota of evidence that Mrs. Zehnle would have surrendered the custody of her child voluntarily, nor is there any evidence of any circumstances existing or to exist in the future, which would justify a court in repudiating her custody and give custody to Zehnle, or if such circumstances would arise, when would it arise, five, ten or fifteen years hence? Such is the status of the record.

A review of the cases where the decedent and the beneficiary were living apart uniformly shows that no damage would be assessed for the loss of comfort, society and protection, unless there was evidence to show that such separation was only a temporary one, or that the parties in the immediate future would be reunited.

In *Pepper v. Southern Pacific Co.*, 105 Cal. 389, at p. 402, the court stated:

“* * * It may well be doubted whether the facts of this case justified any, even the most guarded, instruction in relation to compensation for the deprivation of the comfort, society, and protection of the deceased. The son was twenty-five years of age, and had the legal right to change his residence to a remote part of the state, or of the world, at any time he chose. He was not living with the plaintiff, though in the same town.”

In the case at bar, the decedent was deprived by said decree of divorce of the right to live with his son, or associate with his son, and was not even granted the mere right of visitation (without Mrs. Zehnle's consent).

In *Griffey v. Pacific Electric Ry. Co.*, supra, at page 522, the court stated:

“* * * There is nothing to show that the mother ever received, or that she had any reasonable expectation of ever receiving, any financial aid or personal services from the daughter subsequently to the latter’s marriage. And though the deprivation of society, comfort, and protection is an element of loss, it is as stated, an element of damage only when it has a pecuniary value. *Here the mother and father had lived apart for fifteen years, and the daughter, at the date of her death, was living in the father’s house. Upon what theory, then, can it be said that in the daughter’s death the mother suffered a deprivation of society, comfort, and protection having for her a pecuniary, as distinguished from a sentimental value? We can perceive none whatever.*”
(Italics ours)

In *Sanfillippo v. Lesser*, supra, at page 90, the court stated:

“This testimony includes all of the plaintiffs’ case and it appears therefrom that *there is no evidence that Philipp Sanfillippo, the husband, was living with the deceased at the time of her death or that her society was of any pecuniary value to him or that she rendered any services to him.* It appears that plaintiffs Mamie Mercurio and Salvatore Sanfillippo were married and did not reside with deceased. There is no evidence that they suffered the slightest pecuniary loss by her death. *As to the minor child, seventeen years of age, there is also no evidence that she resided with her mother, and not the faintest suggestion that she suffered any pecuniary loss by*

her death. It is always to be borne in mind that no recovery can be had for grief, sorrow, and mental suffering of the heirs of deceased." (Italics ours)

In *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487, the facts were that the decedent and his wife had lived separate and apart, although not legally separated or divorced for thirteen years, and that during that time she had received no support from her husband, with the exception of several small checks for five or ten dollars which he had sent to her at infrequent intervals. She had heard nothing from him and didn't know of his whereabouts for a six or seven year period prior to his death. From these facts it was urged that the widow had suffered no damage by reason of his death. The court held (p. 491):

"* * * *In view of the fact that the plaintiff and deceased had been living apart, nothing could have been awarded to the plaintiff for the loss of the society, comfort, and protection of the deceased.* The amount awarded is solely attributable, therefore, to the loss by the death of the husband of the legally enforceable right of support against him." (Italics ours)

In *Cossi v. Southern Pacific Co.*, 110 Cal. App. 110, there was involved an action by the father for the death of his ten year old son in an automobile accident, in which both mother and son were killed on November 11, 1927. The evidence shows that in 1925 the appellant's wife commenced an action for divorce and asked the custody of the children, but the action was never carried beyond the point of filing the complaint. In June, 1926, the wife

departed from her husband, taking with her their three children, including the deceased, and from that time until November, 1927, when the boy was killed, the appellant saw his family only once, and during a year and a half period the mother supported the children with the aid of what little money the children themselves earned. After stating the measure of damages in death cases, the court, on pages 112-113, stated:

“It was incumbent upon appellant to prove by a preponderance of the evidence that pecuniary injury was reasonably certain to be suffered by him from the death of his child. The jury may well have concluded from the facts before them that father and son were so little interested in one another that there was no reasonable certainty that the continued life of the son would be of any pecuniary value to the father.” (Italics ours)

From the case of *Burbidge v. Utah Light and Traction Co.*, 196 Cal. 556, it is shown that the Utah courts follow the California law on this question. In said case the decedent had lived separate and apart from his three minor children for about eighteen months prior to his death. The trial court gave the instruction that there was no evidence of the loss of society and companionship, and hence no recovery of damages could be had on that ground. The Supreme Court on appeal, in regard to the subject (p. 558) said:

“The court instructed the jury that the plaintiff was not entitled to recover for loss of companionship and society of the deceased. No complaint is made to that instruction. We assume that none could have been made under the circumstances shown by the testimony.”

These cases establish the local law and the law controlling this case, and it should be noted that in these cases in determining whether such loss did exist, the court was compelled in each case to accept the evidence as to conditions and circumstances existing at the time of the death. In none of the above cases was the jury allowed to speculate or imagine in the absence of evidence, as to whether or not the decedent and the beneficiaries might become reunited. Yet, in the case before the court the opinion, without foundation in the record, declared that there was a substantial likelihood that the deceased and the beneficiary would come together in a "father guardian relationship."

We further desire to call the court's attention to a more recent case of *Zeller v. Reed*, 26 Cal. App. (2d) 421, decided in 1938, in which case the plaintiff was the mother of the minor deceased. The father had died and the plaintiff had remarried. The plaintiff (mother) entered into a written contract with her brother-in-law, wherein the brother-in-law (the boy's uncle) agreed, at his expense, to provide a home, support, maintenance and education of the deceased, and that the uncle should be entitled to his services. There was evidence that in the ten years preceding the minor's death there had been three or four visits with his mother, and some correspondence between them. The court returned a verdict in favor of the mother, in the sum of One Thousand Dollars (\$1,000.00), and the trial court granted a motion for a new trial as to the issue of the adequacy of damages only, upon the ground of insufficiency of the evidence to sustain the verdict, and in affirming the order granting a new trial, the court, on page 425, stated:

“* * * Under the evidence it is a very substantial award. The plaintiff had received nothing from the earnings of her son and there is nothing in the evidence to indicate that she had any reasonable ground for expecting any financial assistance from him. Their contacts in the ten years preceding his death had been confined to correspondence and three or four visits. While the trier of fact is vested with the primary duty of fixing the amount of damages that would be reasonable, it is obvious that a large award could not be supported by the evidence before us.”

On the retrial of the above case, the jury rendered a verdict for Thirty-two Hundred Eighty Dollars (\$3280.00), in favor of the mother. On appeal from said latter judgment, the appellate court (38 Cal. App. (2d) 622) (decided April 26, 1940) stated that the plaintiff went into greater detail concerning the mother's relations with her son than on the first trial, and on the second trial the evidence showed that she visited her son in California for about eighteen months in 1925 and 1926, and he visited her in Ohio during 1928, 1930 and 1931, for visits of three weeks, one month and six weeks, and that the minor was a kind, dutiful and affectionate son, that he had given his mother many gifts such as a dress, a coat, a brooch, twenty-five pounds of uncured olives, and various other things, and he wrote letters to his mother about three times during a month. In view of the fact that the uncle was entitled to receive all of the minor's services, it was held that the plaintiff could not be granted relief for that item, and the court held that any support that she may have received after he reached his majority could not be recovered, as the same would be based upon mere speculation.

Then the court followed the general rule in California, that in fixing pecuniary loss for the deprivation of society, comfort, and protection, the evidence must show some relation between the amount awarded and the evidence, and held that plaintiff's future loss from being deprived of the receipt of various gifts that would continue to be given by the minor to his mother, plus such meager loss of comfort, society and protection, would not warrant a verdict in excess of One Thousand Dollars (\$1,000.00), and again held that an award of One Thousand Dollars (\$1,000.00) was a very substantial award under the evidence then before it. The court then conditionally reduced the verdict from Three Thousand Two Hundred Eighty Dollars (\$3,280.00) to One Thousand Dollars (\$1,000.00).

It will be noted from this case that there was evidence of society, comfort, and protection rendered by the decedent to his mother in the form of letters and occasional visits, which could have had a small pecuniary value, and which when considered with the loss of future gifts from her son, would not under any hypothesis exceed One Thousand Dollars (\$1,000.00).

There is much evidence in the Zeller case which does not exist in the case at bar, but the Zeller case is important for the reason that in said case the decedent and beneficiary lived in separate states, approximately the same distance apart as the respective residences of the deceased and the appellee in the case at bar, and likewise, the evidence in both cases showed that the deceased had a normal affection that a parent would have for a son, and, likewise, the contacts between the parties would be by correspondence and occasional visits. It is self-evident

that no jury should be permitted to award a greater amount to the appellee in the case at bar, than the California courts permitted under similar circumstances in the Zeller case, irrespective of the present value of the dollar.

The courts in California have recognized the right to recover pecuniary loss of comfort, society and protection where parties were living apart at the time of the death of the decedent, and where the evidence shows that such separation is only temporary or of short duration, and if death had not intervened, the parties would have again lived together. Such is the case of *Rickards v. Noonan*, 40 Cal. App. (2d) 266 (decided July 31, 1940), in which the plaintiff was the decedent's wife, and a judgment was awarded in her favor in the sum of \$3,438.64. From the evidence it appeared that divorce proceedings had been instituted by the plaintiff against the deceased, for the plaintiff's purpose of reforming the deceased; that intermittently throughout their married life, the deceased had gambled considerably, and the plaintiff had attempted to break him of the habit, and sought the divorce to teach him a lesson; that she still loved him. Soon after the entry of the interlocutory decree the parties started to reconcile their marital difficulties, and some time prior to his death they began to see each other every other day or so, and during the two weeks preceding his death they had various engagements for lunches, dancing, playing games and riding together. They discussed going back together again. Sexual relations between them were had on the two nights preceding his death, and although they had become reconciled, they had not yet moved together again, because decedent had many bills to pay and he wanted to get on his feet first.

It was contended therein that the principle of *Powers v. Sutherland Auto Stage Co.*, supra, was applicable and no part of the award could be attributable to the loss of society, comfort and protection. The court held that said case was not applicable, because it was within the contemplation of the law that one of the important purposes of the interlocutory decree was to give the parties a chance to effect a reconciliation, and in this regard, the court, at page 274, stated:

“* * * Reconciliation is to a great extent dependent upon the intention of the parties. The existence of such intention in the instant case is supported by evidence. Their frequent meetings and friendly companionship, their decision to reunite, their indulgence in sexual intercourse, their desire to move together as soon as their financial condition would permit, and the testimony that they had become reconciled, could result in a conclusion that a reconciliation had taken place.”

Another such case is *Cannon v. Kemper*, 23 Cal. App. (2d) 239 (decided October, 1937). In this case the plaintiff recovered a judgment against the defendant in the sum of \$25,000.00, for and on account of the death of her husband. Here too was a case where the husband and wife were separated at the time of the husband's death. The evidence set forth the circumstances of the separation, which is fully shown in the following statement of the court, appearing on page 244:

“As to the fourth assignment of error, we may add that the record shows that the plaintiff and the deceased were not living together, that for three or four years the deceased had had difficulty in obtaining em-

ployment. The wife had returned to her mother's home in one of the southern states. It does not appear that the wife and the husband were estranged, or that any marital differences had caused their separation. Under these circumstances the cases cited by the respondent, to wit, *Gilmore v. Los Angeles Ry. Corp.*, 211 Cal. 192 (295 Pac. 41), *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487 (213 Pac. 494), and *People v. Stokes*, 71 Cal. 263 (12 Pac. 71), sufficiently show that the plaintiff in this action was and is entitled to the damages awarded."

The foregoing cases constitute all of the cases that our research has revealed, involving the legal effect of the fact that decedent and beneficiary were living apart, upon the right to recover pecuniary loss for being deprived of society, comfort and protection, and in all of said cases the court deemed the evidence of the condition existing at the time of death as the gauge for determining whether such loss occurred, and in no instance was the jury permitted to speculate or imagine as to what could occur in the future, but were limited to the circumstances shown by the evidence.

Further, it is to be noted that, as provided in Section 1958, of the Code of Civil Procedure of the State of California, an inference is a deduction which the jury makes *from the facts proved*, without express direction of law to that effect. Hence, in the absence of fact proved, the law does not permit such inference as drawn by the court in its opinion.

Moreover, the law does not declare or create any presumption to the effect announced in the opinion. A presumption is a deduction which the law expressly directs

to be made *from certain facts* (Sec. 1959, C.C.P.). A research reveals no cases which even indicated that such finding could be derived through the operation of a presumption. However, the case of *Dean v. Oregon R. and Nav. Co.*, 80 Pac. 842 (Washington), which was approved in *Cossi v. Southern Pacific Co.*, *supra*, holds that where a minor son left the home of his parents without their consent and never sent them any of his wages or contributed to their support or assistance, it could not be presumed that the parents would have asserted their parental authority over said minor, at any time or place, when or where they might find him prior to reaching his majority, and collect his wages and thereby support a recovery for the death of said son. In this regard the court, on page 844, stated:

“It is contended strenuously by appellant that respondent has shown no damages entitling him to any recovery. The evidence shows that the decedent left the home of his parents some years ago without their consent, and some time thereafter enlisted in the army, being dishonorably discharged therefrom a short time prior to his death. The evidence of respondent and wife shows that after decedent left, he never sent them any of his wages, or contributed to their support or assistance in any manner whatsoever. Appellant claims that these facts establish a manumission. Respondent argues that he had a right to assert his parental authority over said minor at any time or place when or where he might find him prior to his reaching his majority, and that he would have power to collect his wages, and that it must be presumed that the minor would return home or turn over his wages, or a portion thereof, to his

parents. We do not think, under the facts of this case, that this presumption can be indulged * * *. But it appearing that he had abandoned the home of his parents, and had sent them absolutely nothing since said abandonment, we do not think it a fair presumption to be indulged that his conduct for the few years preceding his death would all be changed, and that he would soon be found returning home, or contributing his wages to the parents. This was a matter requiring proof. As the record stands now, we can find no evidence to sustain a verdict of damages.”

The foregoing case is a compelling authority for the proposition that the probability of a change of custody or the probability of a decree directing the father to support his child are matters requiring proof. In the record in the case before the court there is no evidence or proof in this regard. If such proof is obtainable the opportunity to produce the same lies solely on the appellee, his mother or members of his father’s family. We earnestly contend that this court should not permit such a verdict for a large amount of money to stand solely upon conjecture, surmise or imagination, but should direct a retrial and require the plaintiff to produce the proof, which under the law is the legal basis of a verdict in death cases.

This court has sustained a verdict upon an inference or presumption as to what might happen at some unknown and uncertain time in the future. There was as much reason for the court in the *Zeller* case, supra, to affirm the verdict of \$3,280.00, upon the ground that the jury could have inferred that the uncle would voluntarily surrender custody of the minor to the mother, as there was

reason in the case at bar to affirm upon the inference that there might be a change of custody from the mother to the father.

The reason the court in the *Zeller* case did not permit the verdict to stand, was because the court was compelled to accept the existing relationship, when there was no evidence of the reasonable probability of a change in custody, and the court would not permit an inference of the happening of such change to be based on pure speculation and imagination.

Since it appears that the mother in the *Zeller* case loved her son at least as much as Zehnle loved the appellee, and the future contacts between the deceased and the beneficiary would have been approximately the same, it appears that recovery in the *Zeller* case is a fair and reasonable guide to the maximum recovery that could legally be allowed for this item of damage in the case at bar.

III.

NO PROOF OF LOSS OF SUPPORT

The court appears to have determined that the decedent was legally obligated to support his son for the full period of his minority, on the basis of a contribution of One Hundred Thirty-one and 65/100 Dollars (\$131.65) per month. Apparently, the basis of the court's opinion is the improper assumption that the parents of the appellee were divorced in a substituted service proceeding, and hence the Nevada court had no power or jurisdiction to determine the amount of the father's obligation to sup-

port his son. As pointed out in appellant's briefs, there was absolutely no evidence in the record as to how the Nevada court acquired jurisdiction over Zehnle. The findings of fact and conclusions of law of the Nevada court, as shown by the decree of divorce, were that the defendant did not appear, but it appearing from the proof of service on file therein "that more than thirty (30) days had elapsed, since *due and legal service upon said defendant*, the default of the said defendant" was duly entered by the court within the time allowed by law (R.43). The only evidence in the record relied upon to contradict such finding is set forth in a letter from the decedent to his then wife, dated November 10, 1944, where he states: "I received the summons from your lawyer. I guess you forgot to tell him I am a seaman."

Many things would have occurred which would have given the Nevada court jurisdiction in *personam* over the decedent. The decedent might have signed the customary document, used in the State of Nevada, which admits service of the summons and consents to the jurisdiction of the court. Furthermore, the decedent did not say where he received the summons. He could have received it in Nevada, in so far as appears from this record. The status of the record in the case at bar appears to be identical to the record in the case of *Davies v. Fisher*, 34 Cal. App. 137 at 140, where it is stated:

"In the decree of divorce granted to the plaintiff in the state of Nevada it is recited that proof of service of summons and complaint was shown to have been made. We will therefore assume, in so far as it is material here, that the Nevada Court acquired full jurisdiction over the subject matter and person of

the defendant. We then find that the decree, after decreeing that the marriage be dissolved, awarded the custody of the minor child to the plaintiff, without making any provision for her support or maintenance. Under such a decree prima facie the husband is relieved from the liability on account of any claim for the support of that minor child." (*Italics ours*)

The letter of November 10th, does not state where Zehnle was when he received it, nor what type of service was made, nor does it reveal what he did after he received the complaint, or whether he consented to jurisdiction or not. Therefore, the Court's statement that said proceeding was a substituted service proceeding is without support in the evidence, and is based upon pure speculation. Again this missing evidence was available to appellee, but he elected not to introduce it.

In the event that the evidence did support the assumption of substituted service of process on Zehnle, nevertheless the Nevada court had jurisdiction to award the custody of the appellee to his mother, as the verified complaint in the divorce action recited that Jerry Zehnle was residing with the plaintiff in Washoe County, Nevada (R. 40), and hence the child and the mother were within the jurisdiction of the court (see *De La Montayna v. De La Montayna*, 12 Cal. 101 at 116). When the mother was awarded the exclusive care, custody and control of the child, Section 196 of the Civil Code of the State of California then became applicable, and the operation of such section to that circumstance placed the primary duty of the support upon Mrs. Zehnle. Since the child and Mrs. Zehnle were residents of the State of California at the

time of the death of the decedent, the California law would control as to the obligation of the decedent to support the appellee. Under the law of said state, as thoroughly shown by the appellant's briefs on file herein, the primary obligation was placed upon the person to whom said custody was granted, and it would remain there until that relationship was altered or changed by the circumstances outlined in the briefs and in the instructions of the trial court to the jury, which are set forth in the opinion.

We have no quarrel with the instructions set forth in the opinion. They all correctly recited the law, and the jury was instructed that the affirmative of the issue must be proved, which "means that the plaintiff is required to prove his case by a preponderance of the evidence" (R. 92). The jury was also instructed as to the definition of the "preponderance of the evidence." Every instruction in regard to damage was premised upon what the jury found from the evidence. The words "if any," in reference to losses, appear throughout all instructions, and hence the jury was compelled by these instructions to determine the amount of the losses, if any, from the evidence, and was expressly instructed that in estimating damages, the members of the jury must not "indulge in speculation or conjecture nor can you permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy" (R. 99).

The appellant is at a loss to understand how such instructions and the appellant's failure to except thereto, would debar this court from determining whether this verdict and judgment was sustained by the evidence.

As to this item of alleged damage, the same situation exists, as existed under the item of alleged damage discussed under point 2 hereof, in that there was no evidence of any reasonable possibility of voluntary contributions by the father to the son, if the father had lived (particularly because of his prior failure to support his family), nor was there any evidence that the substituted source of supply to the child would fail because of the failure or inability of Mrs. Zehnle to support her child. She admitted that she could work and was working, but she failed to testify as to what her earning ability was in dollars, or whether under such earning ability she would be able to support her son, or, in other words, perform her primary duty. That fact was within her own personal knowledge and easily capable of proof. The appellant should not be made to respond to a judgment in the sum of Twenty Thousand Dollars (\$20,000.00), because appellee failed to assume his burden of proof, nor should the appellee be permitted to gamble upon the jury returning a larger verdict by and through inferences, by not putting in the proof within his guardian *ad litem's* personal knowledge, nor should he under any circumstances be permitted to obtain a verdict by refusing to prove what might have prevented a recovery.

Furthermore, the court's implication that if the question of the father's liability for the support of his son was litigated it *may well have been* for the latter's full support is not supported by the evidence. Mrs. Zehnle admitted that she had no knowledge of Mr. Zehnle's earnings since they were married, except for four months while he was in the Merchant Marine (R. 71), nor did she

testify as to the amount of her earnings. It is just as consistent to speculate that the mother was more able to support the child. Moreover, how could any court fix an obligation in dollars and cents, without knowing the financial circumstances of the father and the mother, yet this court permits this to be done in this case on the basis of One Hundred Thirty-one and 65/100 Dollars (\$131.65), per month, without knowing such circumstances, and when during marriage, decedent contributed but \$20.00 to \$50.00 to the support of both his wife and child.

The plaintiff has no greater responsibility in a death case, than the decedent would have had himself, if he had lived, and hence the same requirements and procedure apply to the appellant that would have applied to the decedent, if he had lived, for, in the end the judgment is in lieu of support and maintenance only.

IV.

JUDGMENT WAS EXCESSIVE

The court, in its opinion, holds that "the power of appellate courts over damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury," and then "finds no excess in damages awarded." Generally speaking, assessment of damages are left to the sound discretion of the jury, which, however, as stated by the court in *Griffey v. Pacific Electric Co.*, 58 Cal. App. 509, at 516:

"* * * subject to the supervisory power of the court and must be exercised in accord with the rules estab-

lished for the assessment of damages in cases of this character.”

It is universally held in California that this discretion vested in the jury must not be abused, and that the amount allowed in death cases must be reasonably supported by the evidence. A judgment, the amount of which is not supported by the evidence, is deemed excessive as a matter of law. *Hunton v. California Portland etc. Co.*, 64 C.A. (2d) 867 (decided June 14, 1944).

The last mentioned case was an action where the plaintiff sought to recover for the death of his minor son. The jury on the first trial thereof, returned a verdict in favor of the plaintiff for \$6500.00, which was reversed, and on retrial the jury returned a verdict for \$40,000.00 for the death of the son, which the trial court reduced to \$18,000.00. The Appellate Court recognized that in recent years somewhat larger judgments have been sustained than was formerly the case, but in reversing the judgment (as reduced by the trial court) as excessive, the court, on page 884, stated:

“In the instant case, there can be no question that the allowance of \$40,000 made by the jury was excessive both as not supported by the evidence and as indicating passion or prejudice. A former jury appraised the same loss, including the value of the truck, at \$6,500. The question before us now is whether the court, in reducing this improper verdict, reduced it to an amount which may reasonably be said to be supported by the evidence. There is no definite evidence of pecuniary damage other than with respect to the value of deceased's services during the remainder of his minority, a little over three years.

There is no evidence of other pecuniary loss any greater than would be the case with the ordinary boy of that age. An allowance of \$3,000 or \$4,000 for the services of the deceased during the remainder of his minority would have been liberal. The allowance for the value of his comfort, society and protection must bear a reasonable relation to such pecuniary loss as is shown by the evidence, and could not be very large. (*Zeller v. Reid*, 38 Cal. App. 2d 622 (101 P. 2d 730).) The respondent was 39 years old and engaged in a long established business, and any contributions from the deceased for support in his old age were not only remote and problematical but an allowance therefor in excess of \$3,000 or \$4,000 would hardly be supported by any evidence. Taking all of these things into consideration we are of the opinion that the amount to which the verdict was reduced by the court is still excessive, and that the largest amount which could be held to find any support in the evidence is \$10,000."

As shown by the preceding case, the assessment of damages does not admit of a mathematical precision, but courts have continuously used the present value of past contributions as a guide to determine whether the award was reasonably supported by the evidence.

The case of *Wyseur v. Davis*, 58 Cal. App. 598, involved an action by the mother and father of decedent (their son). Plaintiff had a life expectancy of about nine years. The deceased was forty-seven years of age, unmarried, and a mining engineer, being in receipt of a salary of \$250.00 per month. He had contributed \$100.00 per month for their support, although the parents resided with another son. The court held that the amount of the verdict was excessive, and in this regard, on page 604, stated:

“Under such circumstances the verdict for \$30,000 is excessive as a matter of law. ‘The jury is always bound by the fundamental rule that pecuniary damage is the limit of recovery, and the amount allowed must bear some reasonable relation to the pecuniary loss shown by the evidence’ (*Dickinson v. Southern Pac. Co.*, 172 Cal. 727 (158 Pac. 183).) * * * The evidence shows that the parents would probably have received \$1,200 a year from their son but for his death. At four per cent per annum they would receive an income of \$1,200 a year on the amount of the verdict during the remainder of their lives, leaving the principal sum intact at the end thereof. Computing interest at the same rate, the present value of an annuity of \$1,200 during their expectancy of life is \$8,922. The pecuniary value of the son’s comfort, society and protection could not amount to the additional sum of \$21,078. The language of the court in *Dickinson v. Southern Pac. Co.*, *supra*, is applicable to the facts of this case. It was there said: ‘Eliminating as we must, any consideration of grief and mental suffering occasioned to the survivors by the death, it is impossible to conceive how the loss of the comfort, society, and protection of the deceased could have had a money value of anything like the amount awarded by the jury.’ ”

Applying the principle of the *Wyseur* case to the case at bar, at four per cent per annum, the appellee would receive an income of \$800 a year on the amount of the verdict during the remainder of his minority, leaving the principal sum intact at the end thereof. As shown heretofore, the jury must consider the amount of the contributions made by the decedent to his son during his

lifetime. Such contributions in the case at bar were twenty to fifty dollars per month to both wife and son, or, in other words, an average contribution of \$37.50 or \$450.00 per year, which makes the present value of such annuity the sum of \$6,157.00. This assumption is based upon the premise (as unwarranted as it may be) that the decedent would continue to give his son alone what he heretofore gave to his wife and son. If there was a prospect for the increase of that contribution, the evidence must show it. The jury must not be allowed to speculate on the proposition that Zehnle would voluntarily increase such allowance, after he was advised that his wife had legally and voluntarily assumed the primary obligation to support his son. By filing a complaint with the Nevada court, she asked for a decree awarding her the sole care and custody of Jerry Zehnle, and did not seek any support for herself or their child from the decedent (R. 41).

It may be further noted this was before she knew whether she could or could not obtain service over the plaintiff within the jurisdiction of the court, or whether Zehnle would submit himself to the jurisdiction of the court. It would be more within the scope of the evidence to assume that when the wife's support was eliminated, the contribution (to the son only) would be cut in half, the present value of which would amount to \$3378.50.

As stated in the *Wyseur* case, *supra*, it is impossible to conceive how the loss of the comfort, society and protection of the deceased (particularly, when the deceased and

the beneficiary were legally obliged to live separately, and in fact in separate states) would have had a money value of anything like \$17,000 or \$14,000.

The court, in its opinion, recognizes that the mother, Mrs. Zehnle, had been able to support the child during the first three years subsequent to the death of the decedent, but the jury clearly did not recognize that there should be any reduction in their verdict, because she had performed or could perform her primary duty for that period of years. The court, in its opinion, appears to have overlooked the fact that the sum of \$20,000 is the present value of an annuity of \$131.65 per month for the entire period of the appellee's minority.

Evans v. Oregon Short Line, supra, holds that,

“in order to arrive at the real injury the wife or the minor children have sustained, the jury should be advised of just what they received from the deceased by way of pecuniary aid and assistance.”

If that is the measure of damages in Utah, by what possible hypothesis would a verdict, based on \$131.65 a month contribution be sustained. Secondly, the jury should not be permitted to assume that if he had lived, he would have given more, irrespective of the present value or the future value of a dollar, as there is not an iota of evidence of any reasonable possibility that he would or could have raised his contribution.

The record shows the habits and disposition of the decedent, and it shows how meager were his contributions to the family. It shows that the wife was obliged to divorce him, on the ground of utter failure to support his family. If there was any prospect of his increasing

his contribution, Mrs. Zehnle, who knew the deceased better than any jury, thought little or nothing of that prospect, because she filed and obtained the divorce decree on said ground of lack of support. There is no evidence of Zehnle's earnings during the entire period of his marriage (except when he was in the Merchant Marine). The jury had no basis to determine what his earning capacity was and what he was able to contribute to his family, or to his son. True, the decedent made \$300 a month prior to 1941, as an electrical engineer, but he abandoned that employment and adopted farming as his occupation. Could the jury speculate that he would abandon farming and take up electrical engineering again? Could the jury assume that he would have earned \$300 a month or better from his farming activities? The law says they cannot unless the evidence was adduced to support such finding. As we stated heretofore, if it can be assumed (which it cannot) that either the decedent would voluntarily assume the father guardian relationship with his son, or the mother's ability to support her son would cease, there is nothing in the evidence to support either of said conclusions, or whether they might arise in five, ten or fifteen years. Irrespective of this realm of conjecture and surmise, the jury found the pecuniary loss of monthly contributions to be four times the amount that decedent gave during his lifetime. How can it be held that the amount allowed bears some reasonable relationship to the pecuniary loss as shown by the evidence?

CONCLUSION

In view of the fact that this court affirmed a judgment based upon inferences and assumptions from facts which are not in evidence, this judgment should be reversed and the case remanded for a new trial, with direction that appellee produce evidence of his damage, i.e., earnings of decedent on the farm, his intentions for his future occupation, his prospects of future earnings, and the wife's earning capacity, her financial ability to support her son, her disposition as to the future custody of the son of the decedent, and many other kindred matters, all to the end that a jury could fix an amount of the pecuniary loss suffered by the appellee, which has some reasonable relationship to the evidence.

It is respectfully submitted that this case should be re-examined, and should be set down for re-argument, if the court so desires, at which argument counsel for appellant will be prepared to go fully into the merits of the points herein set forth.

Dated, Sacramento, California, September 23, 1947.

Respectfully submitted,

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Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the counsel for Southern Pacific Company, a corporation, the appellant in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Sacramento, California, September ~~22~~²³, 1947.

HORACE B. WULFF,

*Counsel for Appellant and
Petitioner.*





